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IN THE

SUPREME COURT OF THE UNITED STATES.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Petitioner,

v.

MERCANTILE-COMMERCE BANK AND TRUST COMPANY, a Corporation, HARTLEY B. COMFORT and SIM BEAM COMFORT, Co-Executors of the Last will and Testament of Clarence R. Comfort, Deceased,
Respondents.

No. 469

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, The Equitable Life Assurance Society of the United States, prays that a writ of certiorari issue directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court a full and complete transcript of record of the proceedings of said Circuit Court of Appeals had in the case entitled and numbered on its docket as The Equitable Life Assurance Society, a corporation, Appellant, v. Mercantile-Commerce Bank and Trust Company, a corporation, et al., Co-Executors of the Last Will and Testament of Clarence R. Comfort, Deceased, Appellees, Nos. 12,627 and 13,167, Civil, or so much thereof as is necessary for consideration of the questions involved in this petition, to the end that the case may be reviewed and determined by this Court as provided for by the Statutes of the United States.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Clarence R. Comfort died on July 26, 1940. In January of 1941 the co-executors of his estate instituted this action in the United States District Court for the Eastern District of Missouri, alleging (R. Vol. 1, pp. 2-12) that Comfort had been totally and permanently disabled from March 1st, 1932, to May 18th, 1939, and that his estate was entitled to recover the sum of $29,203.50, the disability benefits provided by two policies of life insurance (concededly Missouri contracts) issued to him by petitioner in November, 1921.

The insurance contracts were of the type which provided for payment of benefits upon receipt of due proof of a disability total in character "when it is present and has existed continuously for not less than three months," and which required that due proof thereof be submitted as a condition precedent to the accrual of benefits. The material portions of the contracts which provide for disability benefits read as follows (R. Vol. 1, pp. 27-29):

> **"Total and Permanent Disability.**
>
> If the Insured becomes wholly and permanently disabled before age 60 the Society will waive subsequent premiums and pay to the Insured a Disability-Annuity of ..... Dollars a month, subject to the following terms and conditions:
>
> (I) Disability Benefits before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:

(a) Waive Payment of All Premiums payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent Disability; and

(b) Pay to the Insured a Monthly Disability-Annuity as stated above; the first payment to be payable upon receipt of due proof of such Disability and subsequent payments monthly thereafter during the continuance of such total and permanent Disability.

Disability shall be deemed to be Total when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such Total Disability shall be presumed to be Permanent when it is present and has existed continuously for not less than three months; and, further, the entire and irrecoverable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will of themselves be considered as Total and Permanent Disability within the meaning of this provision.

(III) Recovery from Disability.

The Society shall have the right at any time or times during the first two years after receipt of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the Insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the Insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premiums will be waived and no further Disability-Annuity payments will be made hereunder on account of such disability."

On October 23rd, 1930, the insured notified the petitioner of a claim for benefits (Def. Ex. 11, R. Vol. 2, p. 376). In the proofs thereafter submitted (R. Vol. 2, pp. 26-30, 377-379) the insured stated he had become totally

disabled on May 29th, 1930, as the result of heart trouble. It was not claimed in the insured's proofs or in the accompanying statements of the two attending physicians that the disability was a permanent one. Each physician stated that permanent disability was "possible"; one stated that disability was "probably" only temporary (R. Vol. 2, p. 28), and the other stated that he did not know whether or not it was temporary (R. Vol. 2, p. 30). On these proofs, which showed a total disability existent for more than three months, the claim was approved and disability paid.

The insured's condition thereafter improved, and finally on March 15th, 1932, the insured wrote to the petitioner as follows (Def. Ex. 17, R. Vol. 1, p. 87):

> "I wish to advise you that I am back at my desk for short periods each day. I hope to regain my strength sufficiently to be able to continue at work and unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims."

Petitioner thereupon notified the insured that it was discontinuing benefits under the claim (R. Vol. 1, p. 89). The insured paid the premiums on the policies without protest as they fell due during the next seven years. Petitioner heard nothing further from the insured concerning a claim of disability until June, 1939, when it was notified by him that he had again become disabled on May 18th, 1939, and wished to file a new claim for disability benefits (Def. Ex. 20, Vol. 1, p. 93). Proof of disability from May 18th, 1939, was then submitted, the claim was approved and benefits were paid to the date of the insured's death in 1940. After approval of the claim, and in October, 1939, however, the insured notified the petitioner for the first time that he intended to make claim for

disability benefits from February, 1932, to May 17th, 1939 (Pltfs. Ex. 5, R. Vol. 1, p. 62). This claim for past benefits was rejected and it is for this period that the suit is brought.

The petitioner's answer (R. Vol. 1, p. 12) contained as defenses: (1) A denial that total disability existed during the period in suit; (2) waiver by the insured of any claim for disability benefits during the period in suit; and (3) estoppel of insured to claim disability benefits during the period in suit.

After a non-jury trial in the District Court, it was held (R. Vol. 1, pp. 181-191): that the insured was actually disabled during the period sued for; that petitioner waived the requirement of due proof of an insured disability by rejecting, in October 1939, the claim for the benefits involved; that under the terms of the policy, in any event, the submission of proof was a condition subsequent and not a condition precedent; that the insured did not waive his claim for disability benefits; and that the insured was not guilty of laches nor was he estopped from claiming benefits during the period involved.

On appeal, the Court of Appeals held that the evidence was sufficient to sustain the finding of the District Court that the insured was disabled, that he was mistaken in his assumption that he was no longer totally disabled when he wrote the letter of March 15th, 1932, and that consequently that letter did not constitute a waiver of his right to the disability benefits provided for by the policies for the period in suit because there had not, under these circumstances, been a voluntary or intentional relinquishment by the insured of a known right, which was essential to a waiver under the Missouri law (143 F. 2d l. c. 400-401). With respect to the further defense that plaintiffs were estopped by insured's letter of March 15th, 1932, to claim and assert that the insured was totally disabled, and was

entitled to the disability benefits provided for under the policies during the period in suit, all that the Court of Appeals said in its opinion was that: "No fact situation is present justifying an estoppel" (143 F. 2d l. c. 401).

The Circuit Court of Appeals further held, however, (1) that the District Court had erred in holding that the furnishing of proof of the insured's disability was a condition subsequent and not a condition precedent to the accrual of disability benefits, and (2) that the court had erred in holding that the petitioner had waived the requirement of the policy for the furnishing of proof of the insured's disability for the period in suit by its refusal to furnish him with blanks for making his proof of disability during that period as he had requested in his letter of October 24th, 1939 (R. Vol. 1, pp. 62-64).

Accordingly, the judgment of the District Court was reversed and the cause was remanded to that court for the limited purpose of finding and determining whether the October, 1930, proofs of disability were sufficient notwithstanding the insured's letter of March 15th, 1932, to establish the insured's total disability throughout the period in suit (143 F. 2d 405). The District Court found in favor of the plaintiffs on that issue at the second trial (R. Vol. 2, pp. 343-357), and rendered judgment in favor of plaintiffs and against petitioner for the sum of $28,856.70 with 6% interest thereon from February 24th, 1940 (R. Vol. 2, p. 358). The judgment entered upon the findings of the second trial was affirmed by the Circuit Court (155 F. 2d 776). The Circuit Court also affirmed an order of the trial court denying a motion for leave to amend the answer to allege as a new defense that the insured had abandoned and relinquished the claim for benefits under the policies for the period in suit, upon the ground that the case had been remanded for a limited purpose and, in addition, that the facts relied upon to establish abandonment had been

the facts upon which the defenses of waiver, estoppel and laches were originally asserted, and that such facts did not, under Missouri law, constitute abandonment.

JURISDICTION.

The final judgment of the Circuit Court of Appeals was rendered in this cause on June 4th, 1946 (R. Vol. 2, pp. 389-390). Petition for rehearing, timely filed by petitioner, was denied on July 17th, 1946 (R. Vol. 2, p. 390).

Jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended, Title 28, § 347, U. S. C. A., 43 Stat. 938, and is supported by the following cases:

Erie Railroad Company v. Tompkins, 304 U. S. 64;
Lyon v. Mutual Benefit Health & Accident Assn., 305 U. S. 484;
Fidelity Union Trust Co. v. Field, 311 U. S. 169;
West v. American Telephone & Telegraph Co., 311 U. S. 223;
Stoner v. New York Life Ins. Co., 311 U. S. 464;
Moore v. Illinois Central Railroad Co., 312 U. S. 630;
Rogers v. Hill, 289 U. S. 582;
Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251;
Simmons Company v. Grier Bros. Co., 258 U. S. 82;
Panama Railroad Company v. Napier Shipping Co., 166 U. S. 280.

STATUTE INVOLVED.

The question presented does not directly involve the interpretation of any statute of the United States.

THE QUESTIONS PRESENTED.

The questions presented are:

1. Were the plaintiffs estopped under Missouri law from claiming that the insured was entitled to disability benefits for the period from March 15th, 1932, to May 19th, 1939, by reason of the insured's letter of March 15th, 1932, stating that "unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims", the insured's failure thereafter to notify petitioner to the contrary and his acquiescence in the termination of the claim, when the petitioner, in reliance thereon, did not thereafter investigate the extent of the insured's business activities, request proofs of continuance of disability or request physical examinations of the insured, as it would otherwise have had the opportunity to do?

2. Was the condition precedent to the accrual of liability for payment of disability benefits, namely, the submission of due proof that the insured was totally disabled and prevented from engaging in any occupation (as construed by Missouri law) from March 15th, 1932, to May 18th, 1939, fulfilled?

   A. Were the proofs of the disability having its inception in May, 1930, which were furnished to petitioner, due proof of an insured disability from March 15th, 1932, to May 18th, 1939?

   B. Did the insured, by his letter of March 15th, 1932, by his subsequent acquiescence in the action of petitioner in terminating the claim, by his failure to protest such action and by his voluntary payment of premiums, withdraw and end his claim and terminate the efficacy of previous proofs as a basis for a claim of continued disability?

C. Are the plaintiffs estopped, by virtue of petitioner's reliance upon the insured's letter of March 15th, 1932, to deny that the insured's claim, first submitted in 1930, was effectively terminated by his letter, in which he in effect withdrew his claim, thus ending the effectiveness of the proofs theretofore submitted?

3. Did the course of conduct of the insured in notifying petitioner that he was terminating his claim and his complete acquiescence in the termination of disability payments and his voluntary payment of premiums thereafter, and petitioner's reliance thereon in considering that the claim was terminated, require the court to consider the claim as abandoned?

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The holding of the Circuit Court of Appeals for the Eighth Circuit in its opinion rendered on the first appeal in this cause on June 12, 1944, that the insured's letter of March 15, 1932 (R. Vol. 1, p. 87), informing petitioner that he had returned to work and that petitioner could discontinue the payment of any further disability benefits under the policies in suit and petitioner's reliance upon said letter, did not estop the plaintiffs from claiming and asserting that the insured was totally disabled and was entitled to the disability benefits provided for by said policies from February 12, 1932, to March 18, 1939, is contrary to and in conflict with the law of the State of Missouri as announced by the courts of that state in the following cases:

Biggs v. Modern Woodmen of America, 336 Mo. 879, 82 S. W. 2d 898;
Hayes v. Manning, 263 Mo. 1, 172 S. W. 897;
State ex inf. Shartel v. Missouri Utilities Co., 331 Mo. 337, 53 S. W. 2d 394;

State Bank of St. Louis v. Frame, 112 Mo. 502, 20 S. W. 620;
Large v. Frick Company, 215 Mo. Ap. 232, 256 S. W. 90;
Fulton v. Kansas City Life Insurance Co., 236 Mo. Ap. 78, 148 S. W. 2d 581;
Equitable Fire & Marine Insurance Co. v. St. Louis & San Francisco Railroad Co., 134 Mo. Ap. 48, 114 S. W. 546;
Royal Mining Co. v. Fidelity & Casualty Co. of N. Y., 161 Mo. Ap. 185, 142 S. W. 438;
Cresmond v. Kendrick, 325 Mo. 619, 29 S. W. 2d 1100;
Huntsucker v. Clark, 12 Mo. 333;
Stevenson v. Saline County, 65 Mo. 425;
Stevens v. Stevens, 309 Mo. 130, 273 S. W. 1066;
Baker v. Keet-Rountree Dry Goods Co., 318 Mo. 969, 2 S. W. 2d 733, 738;
Roberson v. Brotherhood of Locomotive Firemen & Enginemen, 233 Mo. Ap. 159, 114 S. W. 2d 136.

2. The holding of the Circuit Court of Appeals in its opinion rendered on the second appeal in this cause on June 4th, 1946 (155 F. 2d 776), that petitioner had been furnished due proof of an insured disability for the period in suit, is contrary to and in conflict with the law of Missouri as announced in: **Jacoby v. New York Life Ins. Co.,** 229 Mo. Ap. 333, 77 S. W. 2d 840; **Hablutzel v. Home Life Ins. Co. of N. Y.** (Mo. Ap.), 52 S. W. 2d 480; **Moss v. Metropolitan Life Ins. Co.,** 230 Mo. Ap. 70, 84 S. W. 2d 395, and **Bergholm v. Peoria Life Ins. Co.,** 284 U. S. 489, and is in conflict with the rule of law as enunciated by the Circuit Court of Appeals on the first appeal herein rendered June 12th, 1944 (143 F. 2d 397).

The insured, under the Missouri law, was estopped to deny that he had withdrawn his claim for disability benefits (**Union Savings Assn. v. Kehlor,** 7 Mo. Ap. 158, 163), and was required to give notice of and furnish due proof

of disability on the basis of a new claim. **Berry v. Lamar Life Ins. Co.**, 165 Miss. 405, 142 So. 445, 446; **Bott v. Equitable Life Assur. Soc.**, 147 Kan. 671, 78 P. 2d 860, 864.

3. The holding of the Circuit Court of Appeals in its opinion rendered on the second appeal on June 4th, 1946, that the facts established did not constitute an abandonment by the insured of his claim for disability benefits for the period involved in this suit is contrary to and in conflict with the law of the State of Missouri as announced in: **McGeehan v. Mutual Life Ins. Co.**, 131 Mo. Ap. 417, 111 S. W. 604, 605; **Mutual Life Ins. Co. v. Hill**, 193 U. S. 551; **Kendall v. Travelers Ins. Co.**, 45 F. 2d 956, 959; **Bennett v. New York Life Ins. Co.**, 197 S. C. 498, 15 S. E. 2d 749; **McCabe v. Baltimore Trust Co.** (Del.), 180 Atl. 780, 781; **State Mutual Life Ins. Co. v. Heine** (C. C. A. 6), 141 F. 2d 741, 744.

Wherefore, petitioner respectfully submits its petition for writ of certiorari.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS.

The opinion of the District Court on the first trial (R. Vol. 1, pp. 181-191) is reported in 48 F. Supp. 561.

The opinion of the Circuit Court of Appeals on the first appeal (R. Vol. 1, pp. 208-224) is reported in 143 F. 2d 397.

The opinion of the District Court on the second trial (R. Vol. 2, pp. 343-357) is reported in 59 F. Supp. 787.

The opinion of the Circuit Court of Appeals on the second appeal (R. Vol. 2, pp. 383-389) is reported in 155 F. 2d 776.

JURISDICTION.

The jurisdictional statement appears in the petition for the writ of certiorari.

STATEMENT OF THE CASE.

The record upon which the petition is based consists of two volumes, one of which contains the evidence presented on the first trial and the other of which contains the evidence presented on the second trial.

When the insured first claimed to be disabled and entitled to disability benefits under the policies in October of 1930, he submitted certain proofs of claim. In the Claimant's Statement dated October 25th, 1930 (Def. Ex. 12, R. Vol. 2, pp. 377-379), he stated that he became totally disabled on the 29th of May, 1930, as a result of heart trouble. As a part of the proof of claim the statement of an attending physician dated October 24th, 1930, was submitted (Def. Ex. 3, R. Vol. 1, pp. 117-119), which disclosed that the insured had had a complete heart block since at least 1917 (a condition not disclosed in the applications

for the policies issued four years thereafter). A complete heart block is a variation from normal in the heart beat, resulting from the inability of the conduction system of the heart (bundle of His) to carry impulses from the auricle to the ventricle. In a complete heart block this condition is compensated for by the ventricles which produce their own "pacemaker" with the impulses inducing the ventricular contraction originating in the ventricle itself. This heart block had been symptomless for years, but in May of 1930 the heart partially unblocked, giving rise to the group of symptoms described as Adams-Stokes syndrome. Dr. Taussig in the attending physician's statement of October 24, 1930, asserted (Def. Ex. 3, Vol. 1, pp. 117-119):

"10C. How soon, in your opinion, will he be able to resume any business? Approximate date.	Do not know.
D. Is claimant's condition growing worse?	No.
11. Describe fully, diagnosis and symptoms, all injury, infirmity or disease causing present disability, with brief description of physical findings.	Symptomless heart block for many years. In May 1930 a sino-auricular block set in with long periods of asystole and Adams-Stokes syndrome.
13A. Do you believe that the claimant is so disabled that he is wholly prevented from pursuing any and all gainful occupation?	Yes.
B. Is this total disability only temporary?	Probably.
C. Is it possible that he will be prevented for life from following any occupation?	Possibly."

Another attending Physician's Statement, executed by Dr. William Alexander Smith on October 25th, 1930 (Plaintiff's Exhibits E3 and E4, R. Vol. 2, pp. 28-30), asserted that the insured had been disabled since early in May, 1930, that he had complete heart block, that he had had a heart rate of 36 to 44 for about twelve years, when, in May, 1930, he developed arrhythmia. His answers to questions 13B and 13C were as follows:

"13B. Is this total disability only temporary?	Don't know.
C. Is it possible that he will be prevented for life from following any occupation?	Yes."

Upon these statements, which disclosed a total disability existent for over three months, the claim was approved and disability benefits were paid. The subsequent history of the claim was disclosed in a letter from the insured to petitioner dated December 1st, 1930 (Def. Ex. 15, R. Vol. 2, p. 343):

> "If I continue to improve as I have in the past few weeks, I expect to be able to return to work the early part of next year."

In a Claimant's Statement dated January 22nd, 1931, the insured, seeking disability benefits under a Group policy of insurance also issued by petitioner, asserted that he became wholly disabled on May 29th, 1930, as a result of heart block, and stated (Def. Ex. 60, R. Vol. 2, p. 127):

"7A. Do you expect to take up any occupation?	Expect to take up former work as soon as it is safe."

In connection with this Group disability claim, the Attending Physician's Statement of Dr. Taussig was received by petitioner on February 9th, 1931, in which, after

stating that the insured had been totally disabled since May 12th, 1930, he stated that it was uncertain when Comfort would be able to return to work, and further set forth: "Claimant had had complete heart block for many years. In May, 1930, the heart partially unblocked, with production of Adams-Stokes attacks. Attacks have become milder and farther apart of late." Further (Def. Ex. 61, R. Vol. 2, p. 129):

"11A. Do you believe the claimant to be so disabled that he is wholly prevented for life from pursuing any and all gainful occupation?	Possibly.
B. Or is this total disability only temporary?	Probably."

The disability benefits provided by the contracts were paid to the insured until the insured wrote the petitioner on March 15th, 1932 (Def. Ex. 17, R. Vol. 1, p. 87):

> "Referring to your Policy #2851347, and also Policy #2856767, and your Disability Claim #20847 on the above policies. Also referring to your Policy #2450-58 and Disability Claim #G6063 on this policy.
>
> "I wish to advise you that I am back at my desk for short periods each day. I hope to regain my strength sufficiently to be able to continue at work and unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims.
>
> "I wish to thank you very heartily for the promptness with which the checks have come after my Claims were allowed. They have been very helpful in the emergency which arose because of my sickness."

Following the receipt of that letter, the petitioner, under date of March 23rd, 1932, forwarded to the insured a formal termination notice, reading as follows (Def. Ex. 18, R. Vol. 1, p. 89):

"Please take notice that as it now appears that the insured under the above numbered policy is no longer totally and permanently disabled as defined in the above numbered policy, no further premiums will be waived by the Society and no further disability instalments will be paid by the Society. In order, therefore, to maintain the policy in full force and effect, premiums commencing with that due November 3rd, 1932, must be paid."

The petitioner heard nothing further from the insured with reference to this claim, and was not notified of any objection by insured to the action taken (R. Vol. 2, p. 283). Thereafter, no further disability benefits were paid and the insured paid the premiums on the policies for seven years thereafter without protest of any kind.

The next notice of any claim for disability after the insured terminated his claim in March of 1932, was contained in a letter written by the insured on June 22nd, 1939 (Def. Ex. 20, R. Vol. 1, pp. 93-94), in which he stated that for the seven years following the termination of his claim in 1932 he had been able to attend to his work at the office, but that on May 18th, 1939, his physician again advised him to stop work. On July 8th, 1939, he requested blanks for the purpose of filing proofs of claimed disability, stating that he first became totally disabled on May 18th, 1939 (Def. Ex. 22, R. Vol. 1, p. 99). In connection with this new claim for disability benefits, the insured submitted a Claimant's Statement dated August 28th, 1939, specifying May 18th, 1939, as the date when he became wholly disabled as a result of heart block (Def. Ex. 28, R. Vol. 1, pp. 143-145). There was also submitted an Attending Physician's Statement of Dr. Taussig, dated October 29th, 1939 (Def. Ex. 4, R. Vol. 1, pp. 121-123), specifying May 18th, 1939, as the date when the insured first became totally disabled. An Attending Physician's Statement of Dr. J. R. Rodger, dated August 28th, 1939,

stated that the insured became totally disabled on May 18th, 1939, and further disclosed (Def. Ex. 76, R. Vol. 2, p. 305):

"4A. What history of previous illnesses was given to you by insured?	Heart block for many years. Slight angina attacks for one year. Myocardial impairment for three or four months."

When petitioner received due proof that the insured had again become disabled on May 18th, 1939, this new claim was approved (R. Vol. 1, p. 149), and the disability benefits provided for by the policies were paid for the period beginning May 18th, 1939, to insured's death on July 26th, 1940.

It was not until October 24th, 1939, that the petitioner was for the first time informed by the insured that it was his intention to claim disability benefits under the policies for the period from February 12th, 1932, to May 17th, 1939 (R. Vol. 1, pp. 62-64). The claim was rejected by petitioner, and it is for this intervening period between the date when the insured terminated his claim for benefits in March of 1932 and the date when in his new claim for disability he alleged that he had again become disabled, i. e., May 18th, 1939, that recovery was sought.

Among other affirmative defenses pleaded by petitioner to the right of recovery in this action, was the defense (R. Vol. 1, pp. 14-16) that the insured had accepted and approved the discontinuance of the payment of disability benefits and paid without protest premiums on the policies involved during the period in suit; that in reliance on the insured's words and conduct the petitioner had not during the period involved made any regular investigation of the extent of the insured's activity, had not requested any medical examination of the insured or required proof of the continuance of disability, as was its right under the contracts, thereby being deprived of evidence of the in-

sured's physical condition and the evidence which would have resulted from independent investigation of the insured's activity during the period, as a result of which the plaintiffs were estopped from claiming or asserting that the insured was totally disabled and entitled to disability benefits for that period.

The action was tried in the District Court, without a jury. The evidence, almost entirely the testimony of plaintiffs' witnesses, showed that when the insured wrote the letter of March 15th, 1932, withdrawing and terminating his claim for disability benefits, he had resumed his duties as president and manager of two corporations in which he had a controlling interest, and that he continued to function actively as president and manager of these corporations until the time stated in his new disability claim, May 18th, 1939. Plaintiffs attempted to show that his activity had been restricted between 1932 and 1939, although the insured went to his office daily at 8:15 in the morning and stayed until 5:00 in the afternoon (R. Vol. 1, p. 104). He took a rest period of about two and a half hours in the afternoon (a not unusual practice for successful business or professional men in their sixth decade). His son testified that the only thing that he did not do was selling (R. Vol. 1, p. 37). However, Mr. C. A. Wood, secretary and treasurer of the company, testified that as the sales force grew and became organized following the formation of the company in 1920, the insured diminished his selling activities greatly, and that for a year and a half before the inception of the 1930 disability claim, he had done very little selling. As he said (R. Vol. 1, p. 57):

> "Did Mr. Comfort, after the organized sales force with the sales manager, did he continue to do a great amount of selling? A. Yes, sir; pretty nearly up to the time he got sick he was going all the time.
>
> Q. When did he cease to do that? A. Didn't get

but just a little bit done towards I would say a year and a half or something like that before he got sick, he gradually had given up the custom, or something else, and put in part of his time out on the street and the rest of the time around the office.

Q. So this would be a year or a year and a half prior to 1930? A. Yes, sir. Volume of business, he kept the good customers. What I call 'good' I mean big ones. Volume of business is very interesting to us.

Q. So that in 1929 or 1930, do I understand you, Mr. Comfort did a less amount of selling? A. Yes, sir; he visited less, he quit trying to sell."

During the period in suit, the insured spent most of his time at his office in the building where the Comfort Printing Company had its offices. However, he went to the office of The Specialty Company (of which he was also president) for an hour or so every day. This office was located in a different building. In the same building there was located the company printing plant, which he frequently visited. He placed the orders for paper stock, fixed the compensation for employees, consulted with the other officers and department heads, attended directors' meetings and continued his general executive and supervising work for both companies. For his services rendered during the period from March 1st, 1932 to 1939, he received in salary a total of $101,172.50, in amounts ranging from $8,000 to $24,000 annually, and in addition received dividends on the stockholdings in these concerns of $46,935.58. From 1933 to 1938, he consulted his physician once or twice a year (R. Vol. 1, pp. 46, 47).

Because there was no claim pending for disability benefits, there was no reason for petitioner to make an independent investigation during this period of time as to the actual extent of the insured's activities. There was no physical examination of the insured and there were no notices or proofs of a claimed disability (R. Vol. 2, p. 283). As a result the evidence as to the insured's physical con-

dition and the restriction of his business activities was peculiarly within the control of plaintiffs.

On this evidence, given by relatives and close business associates of the insured, it was found as a fact by the trial judge that the insured's business activities were so restricted subsequent to 1932 that he was, in fact, totally disabled (R. Vol. 1, pp. 181-191), that there was a waiver by petitioner of the requirements that the insured furnish due proof of disability as a result of its rejection in October of 1939 of the claim for benefits for the period in suit, that the insured did not waive his claim for disability benefits, and that the insured was not guilty of laches nor was the insured estopped from claiming benefits during that period.

The Circuit Court of Appeals reversed and remanded, holding that the District Court had erred in holding (1) that petitioner had waived the furnishing of due proof of the insured's disability for the period in suit and (2) that the furnishing of such proof was a condition subsequent to the accrual of disability benefits. The cause was remanded for the limited purpose of finding and determining whether the October, 1930, proofs of disability were sufficient to constitute due proof of disability through the period in suit.

Upon the second trial, evidence was offered and admitted to show that an individual suffering for many years from heart block, which was symptomless except for the existence of a slow pulse, would not necessarily be permanently disabled and prevented from engaging in business activity by the fact that the complete heart block became, for a period of time, partial in character with the resultant group of symptoms, i. e., dizziness, faintness and weakness, described as Adams-Stokes syndrome. Upon recovery from such an episode, the heart might return to and continue in its state of complete block, with a slow pulse, the condition with which this insured worked be-

tween at least 1917 and 1930. Plaintiff's own medical witnesses admitted that after the disappearance of the attacks of the syndrome, individuals with such a condition could go back to work (R. Vol. 2, pp. 51, 52—Kountz; R. Vol. 2, pp. 75, 76—Luten).

In answer to hypothetical questions propounding the facts as to the insured's physical condition known by and reported to the petitioner, it was testified that Mr. Comfort could return to activity as a business executive and manager without endangering his life or health (R. Vol. 2, pp. 157, 164, 173, 174—Strauss; pp. 222, 229—Jensen; pp. 246, 250—Asher). It was also shown that many people with complete heart block could and did carry on their normal activities in business, had lived out their normal expectancies and died of other causes (R. Vol. 2, pp. 157, 239).

Upon such evidence, the District Court held on the second trial that the proof submitted to petitioner in 1930, together with general medical knowledge concerning the facts disclosed in those proofs, was sufficient to constitute due proof to petitioner of permanence of the total disability, and that the letter of March 15th, 1932, was not sufficient to show that the insured's total disability had terminated.

The Circuit Court of Appeals, in affirming, held that since the insurer accepted the insured's initial proof as sufficient to establish a covered disability, the legal foundation for the obligation to make disability benefit payments was established during the continuance of the disability, and that no other proof need be furnished in the absence of request therefor.

ARGUMENT.

Point One.

The Court of Appeals held on the first appeal that "no fact situation is present justifying an estoppel" (143 F. 2d, l. c. 401). The facts established at the trial and summarized above clearly disclose a position assumed by the insured inconsistent with the contentions on which the respondents' suit is based and reliance by petitioner on such position to its injury and damage, which facts fulfill the essentials of an estoppel under the Missouri law. **When the insured, on March 15th, 1932, advised petitioner that it need not send any further checks on his claims unless he notified it to the contrary and thereafter paid the premiums on the policies as they became due, without protest of any kind, and acquiesced in the termination of payment of monthly disability benefits, and the petitioner, acting in reliance thereon, and assuming the claim to be terminated, did not request proof of continuance of disability, did not attempt to have the insured examined by an independent physician to determine his true physical condition, and did not independently investigate the actual facts concerning the extent of insured's substantial business activities, all of the elements of estoppel were present.** The holding of the Circuit Court is, therefore, erroneous in that it is in conflict with the Missouri law relating to the doctrine of estoppel under similar states of facts.

It is well recognized in Missouri that an estoppel is distinguished from a waiver in several respects, one of the most important of which, as applied to the present case, is that waiver results only from an intentional relinquishment of a **known** right, whereas **estoppel bars an action even though the insured acted under a mistake of law or fact or both.**

In **Biggs v. Modern Woodmen of America,** 336 Mo. 879, 891, 82 S. W. 2d 898, 905, the Missouri Supreme Court, in defining "estoppel" and in distinguishing between estoppel and waiver, said:

> "While waiver depends upon intention and does not necessarily 'imply any conduct or dealing with another by which that other is induced to act or forbear to act to his disadvantage: * * * an estoppel necessarily presupposes some such conduct or dealing with another' (Thomas v. Modern Woodmen, 218 Mo. App. 10, 260 S. W. 552). The basis of estoppel is 'that a person is held to a representation made or a position assumed when otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has in good faith relied thereon' [10 R. C. L. 689, Sec. 19]."

In **Union Savings Assn. v. Kehlor,** 7 Mo. Ap. 158, 163, with respect to estoppel the court said:

> "The principle is, that where a party by acts or words, induces another to believe in the existence of a certain state of things and to act upon that belief so as to alter his previous condition, he will be estopped to aver the contrary against the party so altering his condition. There was evidence in the present case tending to show an admission on the part of the plaintiff inconsistent with his present allegation, on which this suit is based, that this draft was not paid, an action by the defendant on this admission, and an injury to him by allowing the admission to be now disproved. **This constitutes an estoppel in pais** (Chouteau v. Goddin, 39 Mo. 250)."

In **Hayes et al. v. Manning,** 263 Mo. 1, 46, 172 S. W. 897, 907, the court in distinguishing between a waiver and an estoppel said:

> "While difficult at times to distinguish estoppel from waiver, these distinctive differences may be

noted: waiver, as defined, is the voluntary surrender of a right, while estoppel is the inhibition to assert a right from the mischief that followed; waiver involves knowledge and intention, while estoppel may arise where there is no intention to mislead; waiver depends upon what he himself intends to do, while estoppel depends rather upon what he has caused his adversary to do; waiver may affect the other party beneficially, while estoppel results from an act which operates to the injury of the other party; waiver does not imply that one has been misled to his prejudice, while estoppel always involves this element."

In **State Bank of St. Louis v. Frame**, 112 Mo. 502, 513-514, 20 S. W. 620, 623, the court said:

"It is a well-settled principle of equity that one who makes representations upon which he expects another to act, and upon which such other relies and is induced to act, to his detriment, will not afterwards be heard to question the truth of what was represented, to the injury of one who had been induced thereby to change his condition."

In **Large v. Frick Company**, 215 Mo. Ap. 232, 237, 256 S. W. 90, 92, the court said:

"If one induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that the state of facts does in truth exist. State Bank v. Frame, 112 Mo. 502, 513; 21 C. J. 1060; Lange v. New York Life Ins. Co., 254 Mo. 488, 506."

In **State ex inf. Shartel v. Missouri Utilities Co.**, 331 Mo. 337, 351, 53 S. W. 2d 394, 399, the court said:

"Estoppel is a preclusion in law which prevents one alleging or denying a fact in consequence of his own previous act, allegation or denial of a contrary tenor

(Hodde v. Hahn, 222 S. W. 799, 283 Mo. 320, 329). 'Equitable estoppel, or estoppel in pais, is that condition in which justice forbids that one speak the truth in his own behalf' (DeLashmutt v. Teetor, 169 S. W. 34, 261 Mo. 412, 44). It 'stands simply on a rule of law which forecloses one from denying his own expressed or implied admission which has in good faith and in pursuance of its purpose been accepted and acted upon by another' (McFarland v. McFarland, 211 S. W. 23, 278 Mo. 1, 16). To constitute estoppel in pais, three things must occur: First, an admission, statement or act inconsistent with the claim afterwards asserted and sued on; second, action by the other party on the faith of such admission, statement or act; and, third, injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act."

Estoppel has long been a favorite of the law in barring insurance companies from asserting an inconsistent position to the detriment of claimants. But we refuse to believe that a federal court, applying Missouri law, will apply the doctrine of estoppel with full vigor in favor of an insured and then withdraw from a group of insureds (the other policyholders of a mutual company) the same benefits of that doctrine. In this application for a writ of certiorari to correct the error of a federal court inferior to this tribunal, we turn to further decisions of the courts of Missouri indicating that the insured's 1939 claim for benefits which he had specifically disavowed for seven years prior thereto, i. e., from 1932 to 1939, was barred by estoppel.

In **Fulton v. Kansas City Life Ins. Co.**, 236 Mo. App. 78, 148 S. W. 2d 581, an estoppel was invoked **against** an insurance company under circumstances similar to those which should now bar the insured in this case. In that case a life insurer miscalculated the extended term insur-

ance available after the insured's failure to pay a premium, and in 1932 sent to the insured a letter stating that the policy was being continued in force until December 14th, 1939. The actual reserve, correctly computed, would not have carried the policy beyond September 27th, 1933. The insured died on January 14th, 1938, and when suit was filed on the policy the defendant set up its mistake and prayed for reformation of its records and discharge from liability. **The court held that it could be inferred that the insured relied upon the company's 1932 letter and that the company was, therefore, estopped from contending, contrary to that letter, that the policy was not extended beyond September 27th, 1933.**

Here then was a 1932 letter from the insurer to the insured granting him rights to which he was not entitled under the terms of the policy. That 1932 letter bound or estopped the company. In the case at bar, a 1932 letter from the insured to the company withdrew, terminated and abandoned his claim for disability benefits, and led the company to forego **its** right of investigation **at that time**, to forego its right to **proofs** of the continuance of the insured's disability during the period from 1932 to 1939, and also to forego medical examinations of the insured for the purpose of determining for itself whether the insured was actually disabled during the period in question. The estoppel in the Fulton case is Missouri law applicable to individuals and corporations alike, the insured and the insurer. To apply it in any way other than to bar the plaintiffs in this case would make fish of one and fowl of the other.

So also, under Missouri law, where a partner secured for his firm permission from a railroad to erect a building on its right of way and procured for the railroad the firm's release of liability on account of fire, he was estopped to recover for loss by fire against the railroad in an action in which it was contended that he individ-

ually was the owner of the property and had not released his claim. **Equitable Fire & Marine Ins. Co. v. St. Louis & San Francisco Railroad Co.**, 134 Mo. App. 48, 114 S. W. 546. Prejudice under such circumstances, as here, will be presumed, since it would be impossible to restore the parties to their former positions. **Royle Mining Co. v. Fidelity & Casualty Co. of N. Y.**, 161 Mo. App. 185, l. c. 197, 142 S. W. 438; **Cresmond v. Kendrick**, 325 Mo. 619, l. c. 644, 29 S. W. 2d 1100, l. c. 1111.

It is sound doctrine, recognized in Missouri, but overlooked by the Circuit Court of Appeals, that "one who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon is estopped afterward to assert such right or title." 31 C. J. S. 298; **Dickerson v. Colgrove**, 100 U. S. 578, 25 L. Ed. 618; **Huntsucker v. Clark**, 12 Mo. 333; **Stevenson v. Saline County**, 65 Mo. 425; **Stevens v. Stevens**, 309 Mo. 130, 273 S. W. 1066. This rule is applicable to insurance and other contract rights as well as titles. **Baker v. Keet-Rountree Dry Goods Co.**, 318 Mo. 969, 2 S. W. 2d 733, 738 [9].

Roberson v. Brotherhood of Locomotive Firemen and Enginemen, 233 Mo. Ap. 169, 168, 114 S. W. 2d 136, 139, is quite analogous to the case at bar. In that case the Kansas City Court of Appeals held that a letter of the defendant insurer advising the plaintiff that he had been adjudged to be totally and permanently disabled as provided in the by-laws of the defendant governing its "Disability Benefit Department," estopped the defendant from thereafter asserting that plaintiff was not totally and permanently disabled within the requirements of those by-laws, and said:

> "Furthermore, defendant's own letter to plaintiff, dated December 11, 1931, stated the 'report of medical examination in your case shows you are totally and permanently disabled, as provided in the law

> governing the Disability Benefit Department.' Defendant could only permit plaintiff to become a member of the last mentioned department in the event that he **then was** totally and permanently disabled; and it did not **then** matter from what cause the disability arose. It **was bound by its letter, and is estopped to deny that the plaintiff was, on December 11, 1931, disabled as required;** and the cause of his disability was at that time immaterial."

Manifestly, if the defendant in the Roberson case was estopped to assert that the insured was not totally disabled because of its previous letter to the insured, then it necessarily follows that the insured in the case at bar, and the plaintiffs as his successors in interest, were likewise estopped to claim that the insured was entitled to disability benefits during the period in suit by virtue of the position which the insured assumed when he wrote his letter of March 15, 1932 and thereafter paid the premiums to continue the policies in force for seven years without even the suggestion of a claim. The petitioner not only acted in reliance upon that letter by considering that the claim was closed and terminated, but it was also prejudiced by that letter, since upon the evidence it is apparent that petitioner was lulled into inaction thereby. This is necessarily so because, if any claim had been made that the insured was disabled during the period in suit, the petitioner would have had the right to have the insured furnish proof of continuance of his alleged total disability at periodic intervals (Rec. Vol. 1, page 28), and if it had any doubt whether the insured was in fact still totally disabled it could have demanded an examination of the insured by a physician of its own selection and could also have made independent investigations during the period to determine for itself whether the insured was then in fact totally disabled. The petitioner, having been induced by insured's letter of March 15th, 1932, to forego or to re-

frain from exercising the rights which were expresaly accorded to it by the policies themselves, and which it would have had dehors the policies, the plaintiffs are, under the holding of the Missouri courts in the above cases, clearly estopped from claiming that the insured was totally disabled and entitled to the disability benefits provided for by the policies during the period in question.

The insured's letter of March 15th, 1932, and the insured's voluntary payment of premiums on the policies as they fell due during the following seven years, not only estopped the insured and his successors in interest, the plaintiffs in this action, but also effected a termination of the insured's claim. By these acts the insured made it appear to the petitioner conclusively that he was no longer disabled within the provisions of the policies. This position, consistently maintained by the insured during the entire period in suit, precluded a contention that a disability claim was then pending, and so emphasized and accentuated the estoppel for which we are contending.

Point Two.

A.

Under Missouri law the insurer is entitled to due proof of an insured's disability as a condition precedent to the accrual and payment of disability benefits on a policy having the provisions contained in the policies involved in the instant case. **(Lincoln Nat. Life Ins. Co. v. Ghio,** 111 F. 2d 307.) The type of disability provision here under consideration is the type considered by the Missouri courts in the cases of **Moss v. Metropolitan Life Ins. Co.,** 230 Mo. Ap. 70, 84 S. W. 2d 395, and **Feinberg v. New York Life Ins. Co.,** 233 Mo. Ap. 707, 127 S. W. 2d 83. In these cases the reasoning of this court in **Bergholm v. Peoria Life Ins. Co.,** 284 U. S. 489, was followed. This Court there held (l. c. 491):

"Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability, which is definitely made a condition precedent to an assumption by it of payment of the premium becoming due after the receipt of such proof."

In **Jacoby v. New York Life Ins. Co.**, 229 Mo. Ap. 333, 77 S. W. 2d 840, 845, the Missouri court defined "due proof" as follows:

"Due proof in this case is that more or less formal evidence of plaintiff's total disability within the terms of the policy, the particulars thereof and the data necessary for the defendant to determine its liability (citing Schell v. Metropolitan Life Ins. Co., 3 S. W. 2d, 269).

"Due proof is not required to be made up or furnished in any particular form, nor is it required to be the strongest or best proof available, but it must be such as to give the insurer the essential facts upon which its liability depends and such as is credible and should ordinarily induce belief in the truth of the facts stated (citing Hablutzel v. Home Life Ins. Co. of N. Y., 52 S. W. 2d 480)".

The Circuit Court of Appeals on the first appeal held squarely that under Missouri law the furnishing of proof of a disability covered by the policy was a condition precedent to liability of the insurer (143 F. 2d, l. c. 401). The case was remanded to the District Court for findings by it as to the sufficiency of the proof of loss submitted in 1930 to serve as due proof of the claimed continuous disability extending through the entire period. In other words, it held that the lower court should decide, as a fact, whether the proofs submitted in 1930 were sufficient to constitute due proof that the disability then existing would continue throughout the period in suit.

On the second appeal, however, the Circuit Court ignored

this factual question as to the sufficiency of the proofs, and held, inconsistently with the first ruling, that, as a matter of law, defendant's acceptance of the 1930 proofs and payment of benefits following their receipt was an acceptance and recognition by it of the sufficiency of those proofs to establish total disability throughout the subsequent period in suit. The court held (155 F. 2d, l. c. 778): (1) "The point that is here important is that the insurer accepted and recognized the insured's initial proof as sufficient to establish a covered disability," and (2) (155 F. 2d, l. c. 779): "Once a proof of disability has been furnished, which is sufficient to give rise to a right to benefit payments and premium waivers, the condition precedent or foundation of liability for the disability involved must be held to have been legally met."

Thus, on the first appeal, the court held that the furnishing of due proof of an insured disability for the period in suit (1932-1939) was a condition precedent to the accrual of liability and that there was no compliance with this policy requirement unless the proofs of disability furnished in 1930 were in fact sufficient to show that the insured would be continuously disabled throughout the period in suit. On the second appeal the same court held that the acceptance by the petitioner of the 1930 proofs as then sufficient to establish a covered disability fulfilled the condition precedent for any subsequent period, **regardless of whether their contents indicated that the disability would continue for that period.**

Upon the first appeal the Circuit Court correctly stated the Missouri law as to the requirement of due proof. On the second appeal the Court ignored its own previous ruling and failed to apply the law as it had previously found it to be.

To demonstrate that the proofs submitted in October, 1930, were not sufficient to serve **under the circumstances** as condition precedent proof **for the period in suit, 1932**

to 1939 (a requirement laid down by the first opinion of the Court of Appeals), we draw attention to the following facts more fully set forth in our "Statement of the Case," supra: **(1)** from 1917 to 1930 insured had worked, concededly not disabled, though having a complete heart block; **(2)** Dr. Taussig in October, 1930, as a part of the proofs certified that this heart block had been symptomless for many years, that after the May, 1930 attack the claimant's condition was not growing worse, and that it was probably only temporary; **(3)** Dr. Taussig in February, 1931, repeated that opinion with the additional information that "attacks have become milder and farther apart of late" (Def. Ex. 61, R. Vol. 2, p. 129); **(4)** the insured, in December, 1930 (Def. Ex. 15, R. Vol. 2, p. 343) and in January, 1931 (Def. Ex. 60, R. Vol. 2, p. 127) said that he was improving and expected to return to work early in 1931 but that he would not resume work until it was safe to do so; **(5)** then on March 15, 1932, he voluntarily reported to the company that he was back at work, did not want any more disability checks, and appreciated the money that had been paid in the emergency of his sickness (Def. Ex. 17, R. Vol. 1, p. 87); **(6)** after notice for the company that it was then treating his claim as closed (Def. Ex. 18, R. Vol. 1, p. 89), the insured resumed paying premiums and for seven years asserted no right to disability benefits; **(7)** during this entire time he was gainfully employed at an annual salary of over $13,000 with only partial restriction of his former activities and seeing his doctor only once or twice a year (see Statement, ante); **(8)** in 1939 he and his doctors, treating his first claim as closed, certified to a new claim for a new total disability beginning in May, 1939 (R. Vol. 1, pp. 93-94, 99, 121-123, 143-145, Vol. 2, p. 305); **(9)** this new claim was as promptly paid by the company down to the time of his death in July, 1940, as his former claim from 1930 to 1932 had been paid (R. Vol. 1, p. 149); **(10)** the third claim in

October, 1939, for the period from March, 1932 to May, 1939, was turned down and has ever since been opposed under the severe handicap of attempting in 1940 to investigate events which occurred eight years before, concerning a man who could never be physically examined as of those years in question.

Therefore, as a matter of law, petitioner was never furnished with due proof "that the event insured against had transpired," insofar as the period from March 15, 1932 to May 18, 1939, is concerned, nor was it given "the particulars thereof and the data necessary to determine its liability" either before or during that period. The condition **precedent** was never fulfilled. Moreover, under the very terms of the policies relating to "Recovery from Disability" (R. Vol. 1, pp. 28-29), no further payments were due after March, 1932, because the insured had then by his own letter made it **appear** (see policy) that he was no longer totally disabled.

B.

Inherent in the requirement that the insurer have due proof of the existence of a covered disability is the fundamental requirement that the insurer have notice that a claim is pending. As a matter of contract, it was the legal right of the insurer to be appraised of this fundamental fact, namely, that the insured intended to claim that he was entitled to benefits under the policy.

The basis for this generally accepted concept was well expressed by the Supreme Court of Mississippi in **Berry v. Lamar Life Ins. Co.**, 165 Miss. 405, 142 So. 445, 446:

> "There is, in our opinion, sound reason why insurance companies should be permitted in their policies a provision requiring proof to be made before the waiver of the policy becomes effective. It is, of course, necessary for the success of the life insurance business that unmerited or fraudulent claims should

> be rejected, and, in order to determine whether a claim is just and bona fide, it should have opportunity to investigate the facts at the time the disability occurs or accrues upon which the waiver of premiums depends. Suppose a party taking a policy should pay one or two annual premiums, and then cease paying them without any notice to the company of any disability, continue to live many years, and then dies, and his family claims that there was a disability existing at the time which excused payment of premiums. It would manifestly be impossible, or, at least, exceedingly difficult and expensive, to develop the facts after a long time."

The language was quoted with approval by the Supreme Court of Kansas in **Bott v. Equitable Life Assur. Soc.**, 147 Kan. 671, 78 P. 2d 860, 864. The court there went on to say (l. c. 864):

> "To deny to an insurance company the opportunity to protect itself against stale and fraudulent claims by requiring proof of disability to be timely made, would not only put a heavy burden on the company, but would disregard the sanctity of contracts."

The legal basis for liability for payment of benefits under policies such as the one in suit must necessarily depend upon reasonable notice to the insurer of a pending claim. Without knowledge on the part of the insurer that the insured intended to claim that he is presently disabled and thus entitled to benefits under the policy, there can be no due proof of a covered disability.

When the insured, in March of 1932, withdrew his claim for disability benefits, he thus terminated the effectiveness, if any, of proofs of claim theretofore submitted. There was thereafter no claim pending. An insured may terminate or withdraw a claim at any time he sees fit. When he does so, and notifies the insurer that he is no longer claiming the disability benefits provided by the policy,

any subsequent claim on the policy is a new claim. The legal effect of the previous proofs having been terminated by his action in ending that claim, he must in connection with a new claim submit due proof of a disability covered by the policy as a condition precedent to the accrual of liability. As a matter of fact that was this insured's understanding of his position, and that is exactly what he did in **1939.** In 1939, seven years after he had notified petitioner that he was no longer claiming disability benefits, thus terminating his 1930 claim, he submitted a new claim for disability benefits and furnished due proof consisting of his own statement and statements of his attending physicians that he had been totally disabled **only** from **May 18th, 1939.**

This legal concept which we are arguing here is not to be confused with waiver of the insured's right to disability benefits, which the Circuit Court on the first appeal held had not been established because there was no intentional relinquishment of a known right. It is a legal rather than an equitable concept, namely—that the insured, by withdrawing and terminating **his claim** for disability benefits, ended the efficacy of the proofs theretofore submitted, thus necessitating compliance with the condition precedent of furnishing due proof if a new claim was to be made.

The Circuit Court on the second appeal said (155 F. 2d, l. c. 779):

> "The only other proof which the policies required the insured to furnish was proof of 'the continuance of such total disability' at such times as the policies permitted the insurer to make request for such subsequent proof. No request for subsequent proof or failure to comply with it is here involved."

This statement was clearly erroneous, for the insured had terminated his claim by his letter of March 15th, 1932. It

would be interesting to know what insured's reaction would have been if, after notifying the insurer that it need send no more checks on the claim which he had theretofore presented, he had received forms requesting proof of continuance of disability. No reasonable man would expect an insurer, after being notified that a claim was terminated, to forward to the insured forms for him to fill out as proof of continuance of the claim. The only logical conclusion to be drawn is that a new claim must be made by an insured seeking disability benefits after he has ended a previous claim, and in connection with that new claim due proof of an insured's disability must be submitted.

Under the ruling of the Circuit Court on the second appeal, it would be incumbent on an insurer to continue ad infinitum its investigation of an insured's activities, even after that insured had withdrawn and terminated a claim for disability benefits. No reliance could be placed on an insured's voluntary termination of a claim, for he might claim many years thereafter that he had been disabled during the entire period and the insurer, without evidence of the extent of his actual activities during the period, would be unable to show the falsity of the claim. Such a ruling completely abrogates the contract between the parties which requires that due proof of an insured disability be furnished before any liability accrues therefor. Without notice that there is a claim of disability, there can be no due proof thereof.

Thus, it was error for the Circuit Court to hold that petitioner's acceptance of the proofs of disability in 1930 and its consideration of them as sufficient to establish a covered disability was as a matter of law sufficient to render petitioner liable for the period in suit, for the insured, by notifying the insurer that he no longer claimed disability benefits, ended the efficacy of the former proofs as a basis for his later claim.

C.

Respondents are estopped to deny that the insured terminated his claim for disability benefits in March of 1932. This being true, it was incumbent upon respondents to prove compliance with the condition precedent to any accrual of liability on a new claim (**Lincoln Nat. Life Ins. Co. v. Ghio**, 111 F. 2d 307).

When the insured, on March 15th, 1932, wrote to the petitioner, "unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims," and indicated that he was then working part-time and hoped to regain his strength sufficiently to be able to continue at work, he was notifying petitioner that he was terminating his claim. Nothing further was heard from the insured before the end of the month, and, petitioner wrote the insured under date of March 23rd, 1932, that it was terminating the claim. There was then a complete understanding and agreement by both parties in the action taken. The insured initiated the termination and the company acquiesced. The insured, who had in the letter of March 15, 1932, expressed his gratitude to the insurer for the treatment which he had been accorded, was in complete agreement that his claim was ended, as evidenced by his voluntary payment of premiums as they thereafter fell due.

As a result of this state of facts, petitioner, in complete reliance on the insured's termination of the claim, did nothing further, and treated the claim as ended. It did not request proofs of continuance of disability, as was its right under the contracts, for there was no claim in existence. It did not seek an examination of the insured by a physician of its own selection. There was no reason to, for no claim was pending. If it had knowledge of a pending claim it might have made an independent investigation to determine the true extent of the insured's business

activities. It must be remembered that the finding of total disability on the trial was based on evidence peculiarly within the control of respondents, for, during this seven-year period of time, when no claim was pending, there was no reason for petitioner to conduct investigations. Whether insured was shown in fact to be totally disabled, even on the evidence of the insured's family, friends and old business associates, is questionable. Very little additional testimony would be necessary to establish as a matter of law that there was in fact no disability. However, that point is not involved here. The important consideration is that during this entire period of time, by reason of the position which the insured had taken, the petitioner was deprived of its right to determine **currently** the actual fact.

As a result, under Missouri law, respondents are estopped to deny that the original claim of 1930 was effectively terminated, withdrawn and ended in March of 1932. The elements of estoppel, as defined by Missouri law, were fulfilled. In **Union Savings Assn. v. Kehlor**, 7 Mo. App. 158, 163, the court said:

> "The principle is, that where a party, by acts or words, induces another to believe in the existence of a certain state of things and to act upon that belief so as to alter his previous condition, he will be estopped to aver the contrary against the party so altering his condition. There was evidence in the present case tending to show an admission on the part of the plaintiff inconsistent with his present allegation, on which this suit is based, that this draft was not paid, an action by the defendant on this admission, and an injury to him by allowing the admission to be now disproved. **This constitutes an estoppel in pais (Chouteau v. Goddin,** 39 Mo. 250)."

The admissions by insured in this case are wholly in-

consistent with the present contentions of respondents on which this suit is based and under Missouri law it was error to allow the respondents to dispute the insured's admissions and representations that the claim had ended.

That claim being ended, it was incumbent upon the respondents to establish that a new claim was thereafter presented. The condition precedent to the making of a new claim would be the furnishing of due proof of a covered disability. Concededly, no claim was made until October of 1939 that the insured had during the previous seven-year period been disabled. The condition precedent was, therefore, not established.

Point Three.

The court below erred in holding that under Missouri law the facts in this case did not establish an abandonment of any right to disability benefits between March 15th, 1932 and May 18th, 1939. The term "abandonment", as it applies to a claim such as is involved here, is sui generis in the law. It is not to be confused with the technical abandonment of a homestead (the definition quoted in the opinion of the Circuit Court being taken from a Missouri case involving homestead law).

In **McGeehan v. Mutual Life Ins. Co.**, 131 Mo. App. 417, 111 S. W. 604, 605, the court held that the insured's failure to tender premiums, after an alleged wrongful lapse of the policy by the company, constituted an abandonment by him of all rights under the policy, and said:

> "It must be conceded that so far as plaintiff's rights are concerned, he was at liberty to abandon and rescind the contract. He did not merely neglect a single payment of premium, nor several, but he abandoned all pretense of recognition of the contract for a long series of years."

In **Mutual Life Ins. Co. v. Hill,** 193 U. S. 551, the United States Supreme Court held that the insured had abandoned all rights under the policy by his failure to tender any premiums on the policy after its alleged wrongful lapse by the company.

A good discussion of abandonment as it applies to the situation here involved is contained in **Kendall v. Travelers Ins. Co.,** 45 F. 2d 956, 959:

> "A proof of claim long abandoned and discarded by the parties concerned becomes nudum pactum. Conservative Life Ins. Co. v. National Exchange Bank, 1936, 118 W. Va. 44, 188 S. E. 755. There is no more reason to allow assured to abandon a rejected claim for more than ten years, and then rely upon it in suit as 'due proof', than there is to permit assured to wait for ten years after inception of disability to file proof of claim. If substantial prejudice to the insurance company has resulted, he is precluded from recovery."

This principle was applied in **Bennett v. New York Life Ins. Co.,** 197 S. C. 498, 15 S. E. 2d 749. In the concurring opinion of Justice Baker, 15 S. E. 2d 749, it was stated:

> "Through the silent acquiescence of and payment of premiums by the respondent for a period of years, the appellant was lulled into inaction, whereas as a matter of common knowledge, the appellant would have made inquiries and investigations from time to time had it been advised or given cause to believe that the respondent considered that he was disabled within the meaning of the policy, * * *."

The South Carolina Court further added:

> "* * * Any other rule, in this State, would put it in the hands of the claimant to furnish any flimsy so-called 'due proof', and when the company declared it insufficient, wait until the opportunity for the com-

> pany to show the falsity of the claim has passed, as was done in this case, and then bring action on it * * *."

Abandonment as a defense to an action such as the present one is not to be considered as synonymous with either waiver or estoppel.

In **McCabe v. Baltimore Trust Co.** (Del.), 180 Atl. 780, 781, the court, in distiguishing a "waiver" from an "abandonment", said:

> "A waiver is usually defined as the intentional relinquishment of a known right, but unlike abandonment it operates to the benefit of another person having a right, or a possible right or interest in the same property, whether by contract or otherwise. Jones v. Savin, 6 Boyce 68, 96 A. 756; Id., 6 Boyce 180, 97 A. 591; Hirzel v. Silker, 4 W. W. Harr. (34 Del.) 588, 156 A. 360."

In **State Mutual Life Ins. Co. v. Heine** (C. C. A. 6), 141 F. 2d 741, 744, the court said:

> "The term abandonment symbolizes a concept which is sui generis in the law. It has acquired a technical meaning and is not to be confused with the doctrine of laches or estoppel. It means when applied to choses in action an absolute relinquishment or renunciation of the right."

There can be no question, we submit, but that there was an abandonment by the insured of any claim for disability benefits for the period in suit. In his letter of March 15th, 1932 (R. Vol. 1, p. 87), the insured stated that he was no longer disabled and that the defendant could therefore discontinue the payment of any further disability benefits under the policies in suit, which it did. Following that letter the insured resumed and continued the payment of

premiums under the policies in suit for seven years thereafter, i. e., from March 29th, 1932, until May 18th, 1939, and at no time during that seven year period did he ever claim or assert that he was still totally disabled or make any demand on defendant for the payment of disability benefits. Under the circumstances disclosed by the record, there was an abandonment by the insured of any claim for disability benefits during the period in suit.

Conclusion.

Both opinions of the Circuit Court of Appeals in this case are in conflict with controlling law of the State of Missouri relating to estoppel, condition precedent proofs, and abandonment. For the reasons and under the authorities cited, a writ of certiorari should be issued by this Court to the end that harmony may be restored between state and federal decisions in a case involving questions of public importance and interest determined, as we sincerely believe, contrary to justice and the state law.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Petitioner,
v.
MERCANTILE-COMMERCE BANK AND TRUST COMPANY, a Corporation, HARTLEY B. COMFORT and SIM BEAM COMFORT, Co-Executors of the Last Will and Testament of Clarence R. Comfort, Deceased,
Respondents.
No. 469.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Petitioner,

v.

MERCANTILE-COMMERCE BANK AND TRUST COMPANY, a Corporation, HARTLEY B. COMFORT and SIM BEAM COMFORT, Co-Executors of the Last Will and Testament of Clarence R. Comfort, Deceased,
Respondents.

No. 469.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is not properly invoked under Section 240 of the Judicial Code, as amended, Title 28 USCA, Sec. 347, 43 Stat. 938.

The petition does not present a matter within the principle of:

Erie Railroad Company v. Thompkins, 304 U. S. 64;
Lyon v. Mutual Benefit Health and Accident Association, 305 U. S. 484;
Fidelity Union Trust Company v. Field, 311 U. S. 169;
West v. American Telephone and Telegraph Company, 311 U. S. 223;
Stoner v. New York Life Insurance Company, 311 U. S. 464;
Moore v. Illinois Central Railroad Company, 312 U. S. 630.

Application for this writ has not been made within three months after entry of the judgment determining between the parties the principal issues sought to be reviewed as required by Sec. 8 of the Act of Feb. 13, 1925, as amended, Title 28 USCA, Sec. 350, Sec. 8, 43 Stat. 940.

STATEMENT OF THE CASE.

Petitioner in its Brief presents a Statement of the Case. In view of the issues sought to be reviewed, respondents believe that it will not be undue repetition to restate the case in order that the Court may have before it matters omitted or briefly referred to in petitioner's statement.

ISSUES TRIED.

The case was instituted in January, 1941, by respondents, Co-Executors of the Last Will and Testament of Clarence R. Comfort, deceased, against petitioner, The Equitable Life Assurance Society of the United States, for Total and Permanent disability benefits under the terms of two policies of life insurance issued in 1921.

The petition upon which this cause has been tried is in two counts—one count on each policy in question. The

policy provisions are identical; the pertinent provisions are quoted on pages 2 and 3, Petitioner's Statement.

It is alleged in paragraph "5" of each count of the petition that "Clarence R. Comfort, on or about the 30th day of May, 1930, became permanently and continuously disabled within the meaning of said policy up to and including the date of the insured's death, which occurred on or about the 26th day of July, 1940, in that on said 30th day of May, 1930, the insured suffered a complete heart block, chronic myocarditis, hypertension of the heart and chronic nephritis, which said diseases have continued from on or about May 30, 1940, and progressively became worse until the death of said deceased" (R., Vol. I, pages 5-6, 11-12).

The petitioner in its answer denied the allegation of total and permanent disability within the meaning of the policies in suit, and pleaded by way of affirmative defense, among others, waiver of the alleged claim and estoppel to assert the same (R., Vol. I, pages 12-17).

Upon the issues and evidence adduced at the first trial, the District Court found that "on May 29, 1930, the insured became totally and permanently disabled. Claim for disability benefits and waiver of premium was made and allowed" (Finding of Fact No. 2, R., Vol. I, p. 177), and the Court refused to amend this finding on motion of petitioner so that the same would read, "presumably totally and permanently disabled" (R., Vol. I, pp. 191, 201).

The District Court also found that when the insured wrote the letter of March 15, 1932, quoted at page 15 of petitioner's Brief, and when he paid annual premiums thereafter, "he acted under the mistaken conclusion of fact that he was not totally and permanently disabled within the meaning of the policies" (R., Vol. I, p. 179).

The District Court in its Conclusions of Law declared that the insured was "totally and permanently disabled

during the period from February 12, 1932 to May 18, 1939" (the period here in question), and had not waived his claim, nor were plaintiffs estopped to maintain this action" (R., Vol. I, pp. 179, 180).

The District Court also entered Findings of Fact and Conclusions of Law to the effect that petitioner waived the furnishing of proof of disability for the period here in suit (R., Vol. I, p. 179). After entry of the judgment on December 31, 1942, in favor of respondents for the amount sued for (R., Vol. I, p. 180), petitioner duly perfected its appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

The Appellate Court sustained all of the Findings of Fact and Conclusions of Law referred to, except the Finding and Conclusion that petitioner had waived the furnishing of proof of disability for the period in suit. The Court concluded that under the issues presented by the pleadings and evidence the cause should be remanded for the limited purpose of "findings, conclusions, and judgment as to the sufficiency of the proof of loss on May 30, 1930 to serve, under the circumstances, as proof of loss of the claimed 'continuous' disability extending through the period here involved" (R., Vol. I, p. 223). Under the opinion and mandate this limited issue was to be determined upon such "additional evidence" as might be submitted by the parties and "the evidence heretofore introduced" (R. Vol. I, pp. 224, 225).

After an unavailing motion by petitioner for rehearing, the judgment on this appeal was entered June 12, 1944 (R., Vol. I, p. 225).

The trial of the special issue framed by the mandate and opinion of the Circuit Court of Appeals was had, beginning January 31, 1945, before the District Court.

At the time of that trial there had been adjudicated and determined as between the parties the following:

1. That the insured became totally and permanently disabled within the meaning of the policies in suit on May 29, 1930;

2. That such disability was continuous from May 29, 1930 until the insured's death in 1940;

3. That the insured made claim for disability benefits and waiver of premium after the onset of the total and permanent disability which began May 29, 1930;

4. That the petitioner granted and paid the same until it received from the insured a letter under date of March 15, 1932 reading as follows:

> "Referring to your Policy #2851347, and also Policy #2856767, and your Disability Claim #20847 on the above policies. Also referring to your Policy #2450-58 and Disability Claim #G6063 on this Policy.
>
> "I wish to advise you that I am back at my desk for short periods each day. I hope to regain my strength sufficiently to be able to continue at work and unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims.
>
> "I wish to thank you very heartily for the promptness with which the checks have come after my Claims were allowed. They have been very helpful in the emergency which arose because of my sickness."

5. That the letter of March 15, 1932, above quoted, and insured's subsequent conduct did not waive insured's rights under the policies, nor were his Executors, respondents here, estopped from asserting the same.

At the conclusion of the trial on the special issue, the District Court entered Findings of Fact, Conclusions of Law, and a Judgment in favor of respondents (R. Vol. II, pp. 355 to 358).

Petitioners again perfected their appeal to the Circuit

Court of Appeals for the Eighth Circuit, which court on June 4, 1946 sustained the Findings of Fact and Conclusions of Law of the District Court on the special issue. Petition for rehearing was overruled July 17, 1946 (R. Vol. II, p. 390).

SUMMARY OF EVIDENCE AT FIRST HEARING.

Mr. Comfort, the insured, for many years prior to the issuance of the policies here in question, which were issued in November, 1921, had suffered from what is known as a heart block. This disease was acquired rather than congenital (R. Vol. I, p. 44). In May, 1930, when the insured was approximately 50 years of age (R. Vol. I, p. 110), the condition had become aggravated, resulting in attacks of faintness and shortness of breath. In May of that year he consulted Dr. Taussig, a physician of the City of St. Louis.

This doctor testified that he then examined the insured and found that he was suffering from a serious heart ailment, the result of heart block known as Stokes-Adams disease (R. Vol. I, p. 44). Stokes-Adams disease, which is the result of an acquired heart block, is a permanent serious disease of the heart which becomes progressively worse and eventually results in death (R. Vol. I, pp. 46, 47, 48, 51). In fact, Mr. Comfort died in July, 1940, from progressive heart disease almost ten years to the day after the onset of these attacks in May, 1930 (R. Vol. I, p. 46).

It appears from the medical testimony that when an individual is suffering from heart block, a condition exists in which the ventricles of the heart do not regularly receive stimuli which control the pulse rate. There is a connection between the upper portion of the heart and the lower portion by means of muscle fiber, known as "hiss". This bundle of hiss acts as a telegraphic wire or conduit, conducting from the upper portion of the heart to the ventricles the impulse which regulates the heart beat. When this connection between the upper and lower por-

tions of the heart is impaired, the ventricles establish a heart beat or rhythm of their own independent of any controlling stimuli, and a slow pulse rate is established. In Mr. Comfort's case, the independent heart rhythm established by the ventricles was at a rate of 36 to 44 beats per minute (R. Vol. I, p. 43). The normal heart beat is approximately 72 beats per minute.

A Stokes-Adams attack develops when an impulse suddenly comes from the upper portion of the heart through the bundle of hiss to the lower portion of the heart. The lower portion of the heart, not being accustomed to regular stimuli, because of the block, is thrown into a form of spasm or convulsion. This spasm or convulsion causes the heart to cease beating entirely for short or longer periods of time. This results in faintness, and if at all protracted, in unconsciousness. If this condition continues for any appreciable length of time, death will result (R. Vol. I, pp. 43-44).

In May, 1930, Mr. Comfort's heart disease had progressed to the stage above described, and the doctor considered his condition to be "very definitely alarming" (R. Vol. I, p. 44), and testified that the Stokes-Adams attacks are a feared and expected result when an individual is suffering from acquired heart block. The doctor also testified that this heart disease is "necessarily progressive" and "is bound to get worse as time goes on," and further as follows:

> "Q. He (the insured) died as a result of the ailment you describe through the period from 1930 to 1939? A. Yes, sir" (R. Vol. I, p. 46).

The testimony of Dr. Taussig was confirmed and corroborated at the first hearing by Dr. William Smith, Mr. Comfort's family physician. He specifically stated that "In 1930, due to myocarditis and cardiac degeneration" these attacks began; that Mr. Comfort grew progressively

worse from 1930 until the date of his death in July, 1940 (R. Vol. I, pp. 53, 54).

After the onset of these attacks, in May of 1930, Mr. Comfort later, in 1930, with the assistance of the Company's agent, Bradley, prepared, on blanks furnished by the Company, proofs of disability, which were submitted to the Company in October, 1930 (R. Vol. I, p. 101).

In the insured's statement (Defendant's Exhibit 12, R. Vol. II, pp. 375, 377, 379), captioned by the Company "Disability Claim", there appears, in response to some of the printed questions appearing on the form the following answers:

Question.	Answer.
"8. (a) State the last day on which you did any work.	'A. May 29, 1930.'
"10 (b) State date you expect to assume some business duties.	'A. Have no idea.'

"12. On the '29th' day of 'May' 19'30' I became wholly disabled as a result of 'heart trouble.'"

(The material in single quotes are the answers written by the insured. The remainder of the quotation are the printed questions appearing on the form.)

Dr. Taussig, in the Physician's Statement, Plaintiff's Exhibits E-1, E-2 (R. Vol. II, pp. 26-28), advised petitioner that he had previously treated the insured for "complete heart block," which had existed "since November 16, 1917"; that the insured had had a "history of long continued heart block"; that the insured was not able to pursue any gainful occupation and had not been able to do so "since early in May of 1930" and that he, the doctor, did "not know" when the insured would be able to resume any business.

The forms submitted also requested a "brief" statement from the doctor, in which petitioner was advised that the insured had "symptomless heart block for many years. In May, 1930, a sino-auricular block set in with long periods of asystole and Adams-Stokes syndrome," and further advised that there had been repeated E. K. G. examinations of the insured.

This doctor in response to the question, "Is it **possible** that he will be prevented for life from following any occupation?" stated, "Possibly." (Emphasis ours.)

Dr. Smith's statement, which appears as Plaintiff's Exhibits E-3 and E-4 (R. Vol. II, pp. 28-30), is in many respects the same as Dr. Taussig's, he advised petitioner that he did not know when the insured would be able to resume any business, and, in response to the question as to whether or not the insured is growing worse, advised petitioner that the insured "has myocarditis."

In response to the question requesting a brief statement from the physician, this doctor advised petitioner as follows:

> "Patient has heart rate 36 to 44 for about 12 years. May, 1930, developed Arrythmia. Rate went to 60 and 80 and would change suddenly. Patient would almost faint. Electrocardiogram showed 11 seconds of asystole."

He further advised petitioner of the electrocardiograph tracings and that it was his opinion that the insured was so disabled that he was wholly prevented from pursuing all gainful occupations and that it was "possible" that he would be so prevented for life.

Upon the receipt of these proofs by the Company, in October, 1930, the claim was allowed and no further information was requested by petitioner.

It also appeared, in the record at the first hearing, that

Mr. Comfort had paid a greater or rated-up premium for the policies of life insurance containing the disability and premium waiver benefits here in suit. (The information relating to this matter was further developed at the second hearing.)

Evidence was introduced relating to Mr. Comfort's physical and business activities during the period here in question. Since no attack is made upon the Finding and Conclusion that the insured during the period in question was totally and permanently disabled within the meaning of the policies in suit, this evidence will not be reviewed other than to state that such evidence was substantial, that the insured, within the tests applied by the Missouri Courts, was totally and permanently disabled.

It having been established by the first trial that the insured was totally and permanently disabled, had not waived his claim for the policy benefits, and that respondents, his Executors, were not estopped to assert the same, the only question before the Court in the second hearing was whether or not the technical requirement of proof had been made sufficiently to bring into fruition the policy benefits, for which benefits, because of the knowledge of the company, a rated-up premium had been paid.

SUMMARY OF EVIDENCE ON SPECIAL ISSUE.

It appears from the evidence on the special issue at the second hearing that petitioner knew of Mr. Comfort's heart condition prior to the issuance of the policy here in suit, and that this resulted in rated-up premiums for the policies (R. Vol. II, p. 265). The background of their issuance is as follows:

On November 20, 1929, Dr. G. C. Trawick, the Medical Referee for petitioner, located in St. Louis, wrote petitioner's Medical Director in New York, one Dr. T. H. Rockwell, as follows:

"Dear Dr. Rockwell:—Subject: Clarence R. Comfort
Born July 1st, 1880

"Will you kindly advise if you care to consider the above named for life insurance on any plan? He appears to be a perfectly normal risk, with the exception of his pulse, which I find to be today thirty-four (34) beats to the minute. He gives a history of having a very slow pulse for the last five years, following an attack of Grippe" (Respondent's Exhibit B, R. Vol. II, p. 5).

In reply to this letter, Dr. Rockwell wrote Dr. Trawick on December 30, 1920, as follows:

"My dear Doctor:

Subject: Clarence R. Comfort
Born: July 1, 1880

"In reply to your letter of November 29th, we regret to advise that the Approving Officers are unable to consider the above-named applicant for insurance on any plan" (Respondent's Ex. A, R. Vol. II, p. 6).

Later, however, it was concluded to examine Mr. Comfort for the insurance now in suit, which examination was made in St. Louis by Dr. Trawick, in the presence of Dr. Rockwell, on October 28, 1921. This examination (Respondent's Ex. C, R. Vol. II, pp. 11, 13) confirmed the slow pulse and, by notation, called attention to the above quoted correspondence (R. Vol. II, p. 8).

The Medical Examiner, Dr. Trawick, testified, both in depositions and at the trial, that the record of the slow pulse appearing from the examination, and the correspondence, would indicate to a doctor that the insured was then suffering from heart block (R. Vol. II, pp. 18 and 20).

Drs. Kountz and Luten, heart specialists, who testified on behalf of respondents, stated that they had reviewed the proofs of disability furnished petitioner by insured in October, 1930, consisting of Defendants' Exhibit 12

(R. Vol. II, pp. 377, 379) and Plaintiff's Exhibits E-1 to E-4 (R. Vol. II, pp. 26-30), together with the memoranda or correspondence between the Medical Director of petitioner and its Medical Referee in St. Louis (Respondent's Exhibits A and B, R. Vol. II, p. 9, and Respondent's Exhibit D, R. Vol. II, p. 15), together with medical examination upon which these policies were issued (Respondent's Exhibits C-1 and C-2, R. Vol. II, p. 11). They further testified that based upon the information contained therein their opinion was as follows:

Dr. Kountz—

> "Q. Would you say from those reports and that medical history that the condition would improve or go the other way? A. Certainly get worse.
>
> Q. Certainly get worse? A. Yes. That is, over a period of time.
>
> Q. You could expect in the future—(interrupting). A. He would probably get a little better, and they do temporarily, but over any period of time it is always progressive—downhill.
>
> Q. Is there any warning as to when the Stokes-Adams attacks may occur? A. No, sir.
>
> Q. And any time one of them may occur, death may result? Is not that correct, Doctor? A. That is right" (R. Vol. II, p. 32).

This doctor further testified that the opinion above expressed would have been the same in 1930 (R. Vol. II, p. 59).

Dr. Luten, using the same exhibits, expressed the same opinion (R. Vol. II, pp. 60, 61, 63, 64, 68, 75, 76).

Doctors who testified on behalf of petitioner, while not agreeing to the foregoing conclusions, confirmed the serious nature of heart blocks and Stokes-Adams attacks (Strauss, R. Vol. II, pp. 172, 175, 193, 205).

It also appears from the Record that Petitioner's General Agent in St. Louis, who was acquainted with the insured, saw him from time to time during the period here

in dispute and knew that "he (the insured) was suffering from a serious heart disease" (R. Vol. I, p. 103); that he, the insured, "had an abnormal heart condition" (R. Vol. II, p. 269), of which fact he had previously advised Petitioner by letter of November 28, 1930 (R. Vol. I, p. 92). Likewise, the agent of Petitioner who sold these policies and assisted in the preparation of the proofs above referred to testified that he saw the insured during the period in question from time to time and that he considered the insured to be a "marvel" to look so well "because he knew he was a sick man" (R. Vol. I, p. 101).

The Circuit Court of Appeals in reviewing the Findings of Fact and Conclusions of the District Court applicable to the special issue concluded that the Judgment should be sustained under the provisions of the policy requiring Petitioner to perform its contractual obligations " 'during the continuance of such total and permanent disability' " and further held:

> "What we have said requires affirmance of the judgment. It is not necessary, therefore, to discuss the contentions of the insurer in relation to any other findings and conclusions of the trial court. We may add, however, that the evidence sufficiently supports Findings 4 and 5, 59 F. Supp. at p. 793, and that these findings also would require affirmance of the judgment" (R. Vol. II, p. 388).

The findings referred to in the Court's opinion, which appear in the Record, Volume II, page 356, are to the effect that the proofs of October, 1930, together with all of the other information in the possession of the company and chargeable to it, were reasonably sufficient "for defendant to have knowledge that insured's physical condition of total disability was a continuing and permanent state and would grow progressively worse in all probability" and "gave said company the essential facts upon which its liability under the policies here in suit would depend."

SUMMARY OF ARGUMENT.

I.

The Jurisdiction of This Court Is Not Properly Invoked.

This writ is not applied for on the basis that any substantial public question is involved. It is not charged that any provision of the Constitution or a statute has been considered in the opinion sought to be reviewed.

The sole basis for the writ is that the Circuit Court of Appeals has failed to follow Missouri law. However, there is no claim of a failure to follow a particular case adjudicating issues between these same parties; nor even, a case adjudicating a precise issue. On the contrary, it is essentially a petition for rehearing containing a charge that the Circuit Court of Appeals has failed to follow and apply general principles of law such as the law of equitable estoppel. Such a general charge is not sufficient to invoke the jurisdiction of this Court. If it were, this Court would become a supreme court of appeals.

Further, the principal issue sought to be reviewed, "estoppel," was determined adversely to petitioner in a judgment rendered June 12, 1944 (R. Vol. I, p. 225). No petition for certiorari followed.

The cause was remanded not for a general retrial, but for a limited trial on a special issue (R. Vol. I, pp. 223, 224, 225). The issues on the former trial had been finally adjudicated between the parties, including the defense of estoppel. This writ, therefore, as to such issue, which seems to be a premise of practically every point urged, is not timely.

Even so, the petition is without merit.

II.

The Circuit Court of Appeals Properly Applied to the Facts the Law of Estoppel as Announced by the Missouri Courts.

The District Court in the first trial held that the insured's representatives, respondents, here, were not estopped to assert this cause of action for disability benefits under the policies here in question (R. Vol. I, pp. 179, 180). The Circuit Court on June 12, 1944, sustained the District Court (R. Vol. I, p. 213). These courts likewise held that the insured had not waived these contractual rights, because of the insured's lack of knowledge of the essential facts at the time the act claimed to be the basis of the waiver and estoppel occurred, i. e., the letter of March 15, 1932 (R. Vol. I, pp. 179, 211). The findings on waiver are not attacked by petitioner; the lack of knowledge of the insured, therefore, must stand as admitted.

Despite the contention of petitioner to the contrary (petitioner's Brief, p. 22), under the law of Missouri absent "knowledge" and "conscious misrepresentation," no basis in fact exists for the defense of estoppel, and the Circuit Court of Appeals properly so found (see cases cited by respondents under Point II of this Brief).

III.

The Circuit Court of Appeals Properly Sustained the District Court in Finding and Adjudging Upon the Trial of the Limited Issue That the Proofs in Question Were Sufficient to Serve as Proofs for the Period in Suit.

The District Court at the second trial had before it the limited issue above specified. That Court's findings, conclusions, and judgment in favor of respondents were sustained by the Circuit Court of Appeals June 4, 1946. Rehearing denied July 17, 1946 (R. Vol. II, p. 390).

Under the law of Missouri, due proof to meet the condition precedent to bring into benefit the disability provisions of a life insurance policy is liberally construed both as to form and substance.

The insured having furnished such proof in 1930 which was accepted and never questioned by petitioner was not called upon to furnish new proof of the same disability but only "continuation" thereof during the period in suit. Such are the policy provisions here in question, and such is the law of Missouri. The Circuit Court of Appeals properly so found.

The District Court also found that the proofs of 1930, together with the information which the petitioner had concerning the insured's condition, together with all other information, gave the petitioner the essential facts upon which its liability would depend, thus meeting the requirement of due proof. The Circuit Court of Appeals sustained these findings and conclusions (R. Vol. II, p. 388) on substantial evidence.

It appears that petitioner's real complaint under its second point is not in the law followed by the Court of Appeals but in its sustaining adverse questions of fact. Such action of the Circuit Court of Appeals is not subject to review on certiorari.

IV.

The Circuit Court of Appeals Properly Sustained the District Court Which Denied Petitioner's Motion to Assert a New Defense, "Abandonment," After the Cause Had Been Remanded.

Although it is not mentioned in the Petition, or Brief in support, the motion to assert the defense of abandonment was made after the cause had been remanded to the District Court (R. Vol. II, p. 2). The motion was denied before trial of the limited issue (R. Vol. II, p. 3).

The District Court properly so ruled. The remand was not for general purposes but only for the limited purpose specified in the opinion of the Appellate Court (R. Vol. I, pp. 223, 224, 225).

The defense was not meritorious. It was an attempt to litigate under the name of "abandonment," the same matters litigated under the defenses of waiver, estoppel, and laches, all of which had been adversely adjudicated against petitioner. "Abandonment" like "waiver" involves the relinquishment of a known right. The findings on that issue having been adverse, petitioner was deprived of no defense, even if the motion to amend was timely. The Circuit Court of Appeals properly so found.

ARGUMENT.

POINT I.

The Jurisdiction of This Court Is Not Properly Invoked.

The Petition for Certiorari filed in this matter and Brief in Support clearly indicate that petitioner is seeking by this writ to secure an additional appeal on the merits, having already been twice unsuccessful in the District Courts and twice on appeal to the Circuit Court of Appeals (8 Cir.). It is admitted by Petitioner that the petition for this remedial writ is not predicated upon any provision of the Constitution of the United States, a statute of the United States, or a conflict between decisions of the several Circuit Courts of Appeal.

If there is any basis for the issuance of the writ prayed for, it must be found in a tenuous extension of the doctrine of **Erie Railroad Company v. Thompkins**, 304 U. S. 64. However, the petitioner can point to no failure of the Circuit Court of Appeals to follow a clear-cut line of Missouri cases which are contrary in principle to holdings of the Federal courts, as was true in the **Erie** case. Petitioner does not charge that the Circuit Court of Appeals has failed to follow adjudications by the courts of the State of Missouri between the parties on the issues involved, as was the situation in **Stoner v. New York Life Insurance Company**, 311 U. S. 464; **West v. American Telephone and Telegraph Company**, 311 U. S. 223. It is not even charged that the Circuit Court of Appeals failed to follow Missouri adjudication under the extension of the **Erie** case principle as exemplified by **Fidelity Union Trust Company v. Fields**, 311 U. S. 169, and **Moore v. Illinois Central Railroad Company**, 312 U. S. 630.

On the contrary, petitioner principally seeks a review

of the application of general principles of Missouri law as applied by the Circuit Court of Appeals to a factual situation, found adversely to petitioner, namely, the doctrine of equitable estoppel. Petitioner's real complaint is not the failure of the Circuit Court of Appeals to follow Missouri law, but the failure of that Court to reverse adverse findings of fact.

The doctrine of estoppel and the principles underlying it are not novel; the Circuit Court of Appeals in its application to the facts in the case sought to be reviewed followed a long line of cases of the Missouri Supreme Court.

That this writ seeks to secure for petitioner an additional general review on appeal is demonstrated by the fact that under Point Two, B, of the Brief in Support (pp. 33-36), not a Missouri case is cited; similarly under Point Three (pp. 39-42) not a single Missouri case is cited as to what does or does not constitute "abandonment," although the Circuit Court of Appeals on that issue carefully followed Missouri law.

If more were needed to establish such to be the purpose of the writ applied for, it stands forth at pages 18-21, inclusive, which attack findings, that the insured during the period involved was totally and permanently disabled within the meaning of the policy in suit. This question is not even referred to by petitioner under "Summary Statement of the Matters Involved" nor in "The Questions Presented to the Court."

Further, a serious question exists whether the principal question here urged in a spread-eagle fashion, namely, "estoppel," is now properly subject to a petition for certiorari under Sec. 8 of the Act of Feb. 13, 1925, as amended, Title 28, U. S. C. A., Sec. 350; Sec. 8, 43 Stat. 940, inasmuch as that question was adversely adjudged against petitioner, in a judgment which became final June 12, 1944 (R. Vol. I, p. 225).

The resume of this litigation previously set out makes

it quite clear that the issue of estoppel was pleaded, tried, and determined on the first appeal. No petition for Certiorari was sought following the final judgment in that case.

We find no adjudicated case sustaining the petitioner's right to certiorari as to matters adjudicated by the first appeal, and petitioner cites none.

A superficial analogy may be developed from cases cited by the petitioner (**Rogers v. Hill**, 289 U. S. 582; **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.**, 240 U. S. 251; **Simmons Company v. Grier Bros. Co.**, 258 U. S. 82; **Panama Railroad Company v. Napier Shipping Co.**, 166 U. S. 280).

Those cases are distinguishable in that they dealt with the determination of interlocutory matters principally in injunction proceedings in equity. None, as here, dealt with finally concluded issues of fact and law tried and determined on appeal. The second trial on the matters here before the Court was a trial of a limited question. It presented but a single factual issue, namely, were the proofs of loss previously submitted by the insured and accepted by petitioner sufficient to bring into fruition his contractual rights under the facts of the case, or were these rights, despite insured's total and permanent disability during the period in question, to be forfeited for failure to meet the technical requirement of due proof?

Absent petitioner's contention based upon estoppel, there would be little substantive matter in the Petition and Brief in Support. Since this question was decided against petitioner, more than two years ago, it is suggested that this, without more, is sufficient ground for the Court to deny the writ. This suggestion is of particular force when, as above pointed out, the premise of the writ is not based upon **Erie Railroad Co. v. Thompkins**, or any extension of that principle.

Even so, a consideration of the petition on its merits conclusively demonstrates that the Circuit Court of Appeals followed and applied Missouri law.

POINT II.

The Circuit Court of Appeals, Under the Facts, Correctly Applied the Principles of Estoppel as Enunciated by Missouri Authority.

Petitioner in its Brief hinges practically all points upon the alleged failure of the Circuit Court of Appeals to properly apply and follow the principles of estoppel as enunciated by the Missouri courts.

Petitioner takes the categorical position that the doctrine of equitable estoppel shall be applied as against a party who makes a statement even though that party may not then be apprised of the facts in relation to the statement which is to be the predicate of the estoppel (Petitioner's Brief, p. 22). Therein lies petitioner's error.

In taking this position petitioner recognizes that under Missouri law a waiver "results only from an intentional relinquishment of a **known** right" (Petitioner's Brief, p. 22). The Circuit Court of Appeals on the first appeal sustained findings that the insured had not waived the cause of action in question because of his lack of knowledge at the time of the acts alleged to constitute the waiver. These findings and the law applied thereto are not attacked in this petition. Petitioner, therefore, admits the correctness of the Findings and Conclusions that the insured in writing the much referred to letter of March 15, 1932, had no intention of waiving his contractual rights and was not then apprised of the fact that he was totally and permanently disabled within the meaning of the policy in suit. Admitting this fact, as petitioner does, it nevertheless takes the position that absent this knowledge, the insured was by that letter estopping himself, and his representatives, from demanding the benefits of the same contractual rights. It is elementary that estoppel cannot operate in a vacuum.

This position also ignores the admitted fact that the in-

sured in the letter of March 15, 1932, made no misrepresentation of fact of any kind. On the contrary, that letter in all candor stated the simple truth, namely, that the insured was "back at my desk for short periods each day."

That letter in and of itself approaches a statement of total and permanent disability as announced by the courts of the State of Missouri, namely, that the insured was no longer able to perform all the substantial and material acts essential to his occupation within the meaning of the policy provisions here in suit (**Stoner v. New York Life Ins. Co.** [Mo. App.], 90 S. W. [2d] 784; **Stoner v. New York Life Ins. Co.**, 232 Mo. App. 1048, 114 S. W. [2d] 167; **Stoner v. New York Life Ins. Co.**, 311 U. S. 464; **Comfort v. Travelers Ins. Co.** [Mo. App.], 131 S. W. [2d] 734; **Moss v. Metropolitan Life Ins. Co.**, 230 Mo. App. 70, 84 S. W. [2d] 395, cert. quashed 338 Mo. 589, 92 S. W. [2d] 122).

The fact that the insured insisted upon spending time on the business premises of the company, which he had founded and had devoted his life to, is immaterial because, as was pointed out by the Supreme Court of Missouri in **Bellows v. Travelers Ins. Co.** (Mo.), 203 S. W. 978, "Nothing but death or complete mental collapse equivalent to death could extinguish this (desire) in a normal man."

The Missouri Supreme Court has held that in testing the conduct or acts which are asserted to constitute the estoppel "the conduct of the person alleged to be estopped must be viewed in the light of the understanding he had of his rights at the time the one seeking to invoke estoppel acted and not in the light of what thereafter may be learned or as such rights may thereafter be determined, 21 C. J. 1151-52." **Wilkinson v. Lieberman**, 327 Mo. 420, 37 S. W. (2d) 533.

At the time the letter of March 15, 1932, was written, the insured, no doubt, was under the mistaken impression that if he returned to his place of business at whatever

risk and under whatever circumstances, he must then forego contractual benefits under these insurance policies. The insured acted with commendable frankness, as the Circuit Court of Appeals in this case points out, "because the insured, under the erroneous impression that if he performed any of his former duties, his right to disability-benefits ceased, fair-mindedly informed the insurer that he was attempting to carry on part of his previous work and indicated that he assumed that he, therefore, was not entitled to receive further benefits" (R. Vol. II, p. 386). The petitioner took no step to correct the misapprehension but took advantage of the statements and now seeks to use these truthful statements as a predicate of estoppel as against the representatives of the man who made them.

In contending that the doctrine of estoppel is a bar, the petitioner overlooks the fact that one of the essentials of estoppel in pais is that the acts relied upon to create the estoppel shall be, if not actually fraudulent, at least tortious in character, amounting to intentional misrepresentation or concealment of material facts. This is the Missouri law.

The Missouri Supreme Court in the case of **Blodgett v. Perry**, 97 Mo. 263, 10 S. W. 891 (1888), stated as follows, l. c. 272, 273:

> "Now as to the plea of estoppel in pais or equitable estoppel . . .
>
> "An eminent text-writer treating of the subject of estoppel says: 'The cases when carefully analyzed show that all of the following elements must actually or presumably be present in order to an estoppel by conduct: 1. There must have been a false representation or a concealment of **material facts**. 2. The representation must have been made with **knowledge** of the facts. 3. The party to whom it was made must have been **ignorant** of the truth of the matter. 4. It must have been made with the **intention** that the other

party should act upon it. 5. The other party must have been **induced** to act upon it.' Bigelow on Estoppel, 3rd Ed. 484."

This summary of the essential elements of the doctrine has been followed without deviation by the Missouri Courts. **Burke v. Adams**, 80 Mo. 504; **Lack by Scudder, Guardian, v. Brecht**, 166 Mo. 242, 65 S. W. 976; **Oldham v. Wade**, 273 Mo. 231, 200 S. W. 1053; **Rhoads v. Rhoads**, 342 Mo. 934, 119 S. W. (2d) 247; **Prouse v. Schmidt** (Mo.), 156 S. W. (2d) 919; **Hamilton v. North Eastern Mutual Insurance Assn.** (Mo. App.), 116 S. W. (2d) 159; **Taylor v. Farmers Bank of Chariton County**, 349 Mo. 407, 161 S. W. (2d) 243.

The cases cited by petitioner under Point I of its brief when analyzed set forth no contrary principle of law. In the cases cited there was no question but that the person claimed to be estopped had full knowledge of the facts. As a matter of fact, the Supreme Court in the **Biggs** case, a case heavily relied upon by petitioner, stated that in order to establish an estoppel "there must be a material misrepresentation of fact" (**Biggs v. Modern Woodmen of America**, 336 Mo. 879, 82 S. W. [2d] 898).

If the act of the insured in writing the letter of March 15, 1932, which in the final analysis is the basis of this petition, is considered in the light of the facts, namely, his knowledge and the truth of the statements made, it can be easily understood why the Circuit Court of Appeals ruled that "no fact situation is present justifying estoppel" (R. Vol. I, p. 213).

POINT III.

The Circuit Court of Appeals Followed the Law of Missouri in Holding That the Proofs Furnished Petitioner by Insured in October, 1930, Were Sufficient to Serve as Proofs Under the Policies for the Period Here in Suit.

This cause was remanded to the District Court for the limited purpose of "findings, conclusions, and judgments as to the sufficiency of the proofs of loss of May 30, 1930,* to serve under the circumstances as proof of loss of the claimed 'continuous' disability extending through the period here involved" (R. Vol. I, p. 223).

The Circuit Court of Appeals in affirming the judgment of the District Court, which sustained the sufficiency of the proofs in question, followed the law of Missouri.

The law of Missouri and, for that matter, in every State, is clearly predicated upon the principle that provisions contained in insurance policies relating to notice and due proof are for the benefit of the insurance company and not the insured; are purely technical in character; and that a liberal construction should be given such provisions, both as to their meaning and as to compliance therewith.

This principle no doubt is in part due to the recognition by the Missouri Courts that "the event which causes the loss to the insured is the occurrence of an accident or the beginning of a period of illness and not the giving of notice." **Schoen v. American National Insurance Company**, 352 Mo. 935, 180 S. W. (2d) 57.

These principles are expressed by the Supreme Court

* The Court of Appeals in its opinion on the first appeal referred to the proof of loss of May 30, 1930. This was the approximate date of the onset of the disability. The proofs which the Court of Appeals no doubt had in mind were proofs dated in October, 1930, referring to the onset of the disability as of May 29, 1930. (See Petitioner's Exhibit 12, R. Vol. II, pages 377, 379, and Respondent's Exhibits C-1 to C-4, inclusive, R. Vol. II, pages 26 to 28.) All parties so construed the opinion of the Court of Appeals and accordingly tried the case on the special issue submitted not only in the District Court, but on appeal.

of Missouri in the case of **Hablutzel v. Home Life Insurance Company of New York**, 332 Mo. 920, 59 S. W. 2d 639, affirming the decision of the St. Louis Court of Appeals, reported in 52 S. W. 2d 480.

In that case the Supreme Court of this state, in discussing this question, states as follows:

> "So far as we are advised, the Courts have never defined, except in very general terms, what is meant by 'due proof' as used in insurance policies. Having stated the requirement in such indefinite terms, leaving the insured to determine the meaning of the requirement, and make proof accordingly, the Company ought not be permitted to insist upon a technical compliance with the provision, **either as to form or substance.** It is clear that the proof does not have to be in writing, nor need it be sworn to, **nor must it be the strongest or the best proof available, if it is such as to give the insurer the essential facts upon which its liability depends, and is such as is credible and ought ordinarily to induce belief in the truth of the facts stated, it would seem that it should be regarded as sufficient to meet the requirements of due proof.**" (Emphasis ours.) L. c. 332 Mo. 936.

The St. Louis Court of Appeals, in the case of **Corcoran v. Metropolitan Life Ins. Co.** (Mo. App.), 93 S. W. 2d 1027, in considering the proof necessary to comply with the due proof provisions of a disability policy, ruled (l. c. 1029):

> "* * * Besides we do not understand that the insured, in order to comply with the requirement for due proof, must present to the insurer an undisputed state of facts, or a state of facts on which the insurer could arrive at but one conclusion as to its liability."

As further indication of the liberality of the application of this principle, we note that in the cases of **Wayne v. New York Life Ins. Co.**, CCA 8, 132 Fed. (2d) 28;

Hablutzel v. Home Life Ins. Co. of New York, 52 S. W. 2d 480, affirmed by the Missouri Supreme Court, 332 Mo. 920, 59 S. W. 2d 639, and **Feinberg v. New York Life Ins. Co.**, 233 Mo. App. 707, 127 S. W. 2d 82, the Missouri Courts, and the Federal Court applying Missouri law, have all held that an oral statement to a representative of an insurance company, that the insured is disabled, is sufficient compliance with the requirement of due proof. Those cases further hold that the insured or his executors may recover disability benefits accruing after such statement, upon proof that the insured had been or was totally and permanently disabled.

The attitude of the Missouri Courts on what constitutes due proof is further illustrated by the case of **Wollenberg v. Equitable Life Assurance Society of the United States** (Mo. App.), 96 S. W. 2d 57, wherein it was held that a copy of a petition, served upon the insurance company before any right to maintain a suit for disability benefits had accrued, and therefore requiring the dismissal of the suit, was sufficient to constitute due proof to sustain a judgment of disability in a subsequent suit, brought after the right to maintain the same, had accrued.

The Courts have gone further in expressing a liberal view on the question of due proof in cases of mental disability. In that situation, they have dispensed with proof of the disability. **Schoen v. American National Ins. Co.**, 352 Mo. 935, 180 S. W. 2d 57; **Magill v. Travelers Ins. Co.** (CCA 8), 133 Fed. 2d 709.

In the trial before the District Court and on appeal respondents contended that the proofs in question were sufficient because the insured, having given proofs, accepted as sufficient by the company, of the permanent disability which continued to his death, was not required to give any additional proofs, but only evidence of the continuation of the same disability during the period in suit.

The opinion of the Circuit Court of Appeals, subsequent to trial on this special issue, followed this contention. In so doing the Court clearly was correct, not only under the provisions of the policy, but under the law applicable thereto. The pertinent policy provisions read as follows:

> "(1) Disability benefits before age 60 shall be effective upon receipt of due proof (the insured was approximately 50 years of age May 30, 1930), * * * in which event the Society will grant the following benefits:
>
> "(a) Waive payment of all premiums payable upon this policy to and after the receipt of such proofs and **during the continuance of such total and permanent disability; and**
>
> "(b) Pay to the insured a monthly disability annuity as stated above * * * during the continuance **of such total and permanent disability.**" (Emphasis ours.) (R. Vol. I, pp. 27, 29.)

The policy provisions, above set out, in so many words predicate liability upon continuous disability, which in this case was established by substantial evidence and findings sustained by the Appellate Court.

The case of **Boillot v. Income Guaranty Company**, 231 Mo. App. 531, 102 S. W. 2d 132, is authority, if any is needed, in addition to the policy provisions. In that case it appeared that the insured sustained an accident* which he contended resulted in his permanent and total disability within the meaning of the insurance policy in question. Notice and proof was given to the insurance company. The insurance company refused to pay and suit was instituted for disability benefits resulting in judgment for the in-

* The Supreme Court of Missouri, en banc, in the case of **Schoen v. The American National Insurance Company**, 352 Mo. 935, held that there is no distinction in principle and in law between accident insurance policies and disability benefit provisions contained in life insurance policies.

sured. The Company after a time refused to continue payments and a new suit was brought. The insured gave proof of the continuation of the same disability. The company contended that new proofs were required to sustain the second suit and that mere proof of the continuation of the disability was not sufficient.

In ruling this contention adversely to the insurance company the Appellate Court pointed out:

> "Defendant further contends that the plaintiff failed to prove * * * that he made due proof of his disability as a condition precedent to his right to demand payment and to recover; * * * such proof was made in and by the former suit, as well as prior to the institution thereof; and by that former suit, the plaintiff established his right to recover for total disability, according to the terms of the policy, so long as he lives. It is well-settled principle that the law does not require useless action * * *. Further proof of disability was unnecessary."

Similarly, in the present case, the insured in 1930 made proof of the facts upon which the claim for disability in this case is predicated. In the **Boillot** case the insured had to litigate to establish his total and permanent disability. In the present case it was recognized and accepted on the proofs submitted October, 1930 to the petitioner.

Certainly the rationale of the **Boillot** case and the plain logic of the matter is that if an insured sustains a disability which is continuous he need but give one notice or proof to the insurance company. The Circuit Court of Appeals properly so held in this case under the policy provisions in question and under the law.

In so holding there is no variance, as petitioner charges, between the issue submitted by the opinion on the first trial and the opinion of the Circuit Court of Appeals in sustaining the judgment of the District Court on the

special issue. It merely sustains the sufficiency of the proof under the circumstances which was the issue submitted.

This argument of petitioner also fails to take into consideration the fact that the respondents contended at the trial and on appeal that the proofs in question were sufficient because those proofs when fairly considered, together with all of the information the petitioner then had concerning the insured, were sufficient to advise petitioner of the essential facts upon which its liability would depend. This was the purport of the medical testimony at the trial (R. Vol. II, pp. 32, 59, 75, 76).

The District Court found in accordance with these contentions (R. Vol. II, p. 356, Findings of Fact 4 to 5). In referring to these findings, which were attacked by petitioner on appeal, the Circuit Court of Appeals expressly sustained the findings in the following language:

> "We may add, however, that the evidence sufficiently supports Findings 4 and 5, 59 F. Supp. at page 793, and that these findings also would require affirmance of judgment."

The sufficiency of the decision of the Court of Appeals in this respect is not questioned by petitioner in the Petition for the writ here applied for or in the Brief in Support.

The Petitioner's argument under Point 2-C is again predicated on estoppel. What has been said under Point I of this Brief in regard to the law of estoppel is equally applicable in answer to this contention. There is even an additional answer. The estoppel here charged is not against asserting the cause of action in suit, but against asserting the sufficiency of the proof in question. Such an estoppel was not pleaded. See defendant's answer (R. Vol. I, pp. 12-17).

It is essential in Missouri, as elsewhere, that an estoppel must be pleaded. **Grafeman Dairy Co. v. Northwestern Bank,** 315 Mo. 849, 288 S. W. 359.

It follows that the decision of the Court of Appeals sustaining the proofs in question is amply supported by the evidence and Missouri law.

POINT IV.

The Circuit Court of Appeals Properly Sustained the District Court in Refusing to Allow Petitioner to Assert a New Defense After the Cause Had Been Remanded for Trial on the Special Issue.

The petitioner asserts that the issuance of this writ should follow, because the Circuit Court of Appeals sustained the action of the District Court in refusing to allow petitioner, following the remand of the case, to amend its answer and to assert thereby an entirely new defense designated "abandonment".

No such defense was originally pleaded and no attempt was made to assert the same until after the cause had been remanded by the Circuit Court of Appeals for trial on the limited issue therein specified.

These facts do not appear in the Petition or Brief in support thereof. This we take it is a sufficient answer to the contentions there made. The remand limited the scope of the second trial. **Thornton v. Carter** (CCA 8), 109 F. 2d 316.

Even so it was no error because the facts relied upon to establish the alleged defense of abandonment had been fully considered and adjudicated under the affirmative defenses of waiver, laches and estoppel.

It was held on the first appeal that the insured had not waived the cause of action in question because of his lack of knowledge at the time of the acts alleged to constitute the waiver. No error is charged by petitioner in respect

to this finding. An essential element of defense of waiver or abandonment is knowledge and such is the law of Missouri. **Pocoke v. Peterson,** 256 Mo. 501, 165 S. W. 1017.

If the lack of knowledge precluded the defense of waiver, it likewise precluded the defense of abandonment, for that defense, like waiver, involves the conscious relinquishment of a known right. It follows, even if the motion were timely, that Petitioner, by its denial was deprived of no defense.

CONCLUSION.

It is submitted that the Petition for Certiorari and Brief in Support thereof present no question requiring the exercise of the jurisdiction of this Court. Petitioner has had its day in court and the Circuit Court of Appeals, in sustaining the judgment in favor of respondent, followed the law of the State of Missouri. The petition should be denied.

Respectfully submitted,

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